GEORGETOWN UNIVERSITY LAW LIBRARY
3 0700 00045845 4

YALE LECTURES ON THE RESPONSIBILITIES OF CITIZENSHIP

The Citizen in His Relation to the Industrial Situation. By Henry Codman Potter. (Out of print.)

American Citizenship. By David J. Brewer. (Out of print.)

Four Aspects of Civic Duty. By W. H. Taft. (Out of print.)

The Citizen's Part in Government. By Elihu Root.

The Hindrances to Good Citizenship. By James Bryce.

Conditions of Progress in Democratic Government. By Charles Evans Hughes.

The Relations Between Freedom and Responsibility in the Evolution of Democratic Government. By Arthur Twining Hadley.

America in the Making. By Lyman Abbott. (Out of print.)

The Relations of Education to Citizenship. By S. E. Baldwin. (Out of print.)

The Power of Ideals in American History. By Ephraim Douglass Adams.

The Liberty of Citizenship. By Samuel Walker McCall.

Society and Prisons. By Thomas Mott Osborne. (Out of print.)

The Constitution of Canada in Its History and Practical Working. By William Renwick Riddell.

Policeman and Public. By Arthur Woods. (Out of print.)

Our Social Heritage. By Graham Wallas.

Responsibility and Culture. By L. P. Jacks.

Recent Theories of Citizenship in Its Relation to Government. By Carl Brinkmann.

Citizenship and the Survival of Civilization. By Sir George Newman.

The Public and Its Government. By Felix Frankfurter.

PUBLISHED ON
THE FUND ESTABLISHED IN MEMORY OF
GANSON GOODYEAR DEPEW

The Public & Its Government

BY

FELIX FRANKFURTER

J 15-81
C
1-5

NEW HAVEN · YALE UNIVERSITY PRESS
LONDON · HUMPHREY MILFORD · OXFORD UNIVERSITY PRESS
MDCCCCXXX

JK
271
.F75
c.2

Copyright, 1930, by Yale University Press

Printed in the United States of America

All rights reserved. This book may not be reproduced, in whole or in part, in any form, except by written permission from the publishers.

TO

LUINA

ACKNOWLEDGMENTS

THE following chapters, in substance, were delivered as lectures during the month of May, 1930, at Yale University upon the William E. Dodge Foundation. For many kindnesses connected with the giving of these lectures, I am indebted to President Angell, Dean Clark, Dean Furniss, Mr. Charles P. Howland, and Dean Winternitz.

Dr. James Forrester Davison, now of the faculty of George Washington University Law School, helped in the preparation of the lectures; and the book owes much to the fastidious care of my secretary, Mrs. Esther Howitt.

I am also obliged to the editors of the Atlantic Monthly *and* The Yale Review *for their courtesy in allowing me to use portions of this volume which have appeared in their pages.*

F. F.

Harvard Law School,
July, 1930.

Contents

I. The Demands of Modern Society upon Government 1

II. Does Law Obstruct Government? 36

III. Public Services and the Public 81

IV. Expert Administration and Democracy 123

The Public and Its Government

I

The Demands of Modern Society upon Government

THE test of a citizen, as of a soldier, lies in action. But wise action is the fruit of reflection. Pericles' proud boast of his beloved Athens might well be the measure of our own political ambitions:

> We differ from other states in regarding the man who holds aloof from public life not as "quiet" but as useless; we decide or debate, carefully and in person, all matters of policy, holding, not that words and deeds go ill together, but that acts are foredoomed to failure when undertaken undiscussed.[1]

From year to year, men eminent in statecraft have brought to Yale their reflections on citizenship. I shall not attempt to add to the wisdom of such men as David J. Brewer, James Bryce, William H. Taft, Elihu Root, Charles Evans Hughes, upon the qualities of character underlying effective citizenship, or upon the functions of party, or upon the more general concep-

tions of man's relation to society. Rather, as one who has worried over governmental problems all of his mature life, half of time in office and the other half as a student, I offer not guidance but the perplexities of government. By pooling our difficulties, we may at least avoid the failures which come from conceiving the problems of government to be simpler than they are. If I do not attempt to supply new devices for old ills but to remind of old ills in their new setting, I shall be acting on the conviction of Mr. Justice Holmes that "at this time we need education in the obvious more than investigation of the obscure."[2]

I invite consideration of the actual tasks of government, the demands citizens make upon government, the instruments by which these demands are executed, and the interaction between governors and governed. The essential problems of modern government involve the interplay of economic enterprise and government. Necessarily I shall speak with the preoccupations of a lawyer. And I shall, I hope, sail close to the shore of fact. What is it that we ask of government today? What are the "Demands of Modern Society upon Government"?

Is it true that antiquated legal ideas prevent government from responding effectively to the demands which modern society makes upon it? "Does Law Obstruct Government?" That is my second theme. Those economic services upon which public well-being is so dependent that they are deemed to be public callings although in private hands, present in many ways the most complex series of problems for government, and their complexity is not likely to be abated in the future. Some of the problems they raise, I shall discuss under the title, "Public Services and the Public." And in conclusion I shall try at least to pose basic issues that underlie all our political problems in a chapter bearing the too ambitious title, "Expert Administration and Democracy."

Perhaps the dominant feeling about government today is distrust. The tone of most comment, whether casual or deliberate, implies that ineptitude and inadequacy are the chief characteristics of government. I do not refer merely to the current skepticism about democracy, but to the widely entertained feeling of the incapacity of government, generally, to satisfy the needs of modern society. In a recent speech,[3]

Mr. Owen D. Young encouraged this attitude by his sprightly story of the two sisters, Economics and Politics, in which Politics appeared as a noisy, painted lady elbowing off the stage her shyer but much more reliable younger sister, Economics—Politics getting us into messes from which, happily, we are extricated by the wiser head, Economics. But the fact is that we ask more from government than any society has ever asked. At one and the same time, we expect little from government and progressively rely on it more. We feel that the essential forces of life are no longer in the channels of politics, and yet we constantly turn to those channels for the direction of forces outside them. Generalizations like these elude proof because they are usually based on very subtle factors. But the large abstention from voting in our elections must certainly bespeak an indifference not without meaning.

The paradox of both distrusting and burdening government reveals the lack of a conscious philosophy of politics. It betrays some unresolved inner conflict about the interaction of government and society. I suspect that it implies an uncritical continuance of past assump-

tions about government and about society. We have not adjusted our thinking about government to the overwhelming facts of modern life, and so carry over old mental habits, traditional schoolbook platitudes and campaign slogans as to the rôle, the purposes, and the methods of government. Perhaps such confusion is part of the process of travail toward a more conscious attitude. Certainly there is a great deal of speculative writing about the state. Theories range all the way from a revival of philosophic anarchism to an all-absorbing collectivism. These theories are in part at least illustrated by novel forms of government, like those of Russia and Italy; in part philosophic theories are merely partisan justifications of such experiments. Certainly theory and practice interact. Political societies represent dominant contemporary forces, dominant practical demands made upon government by society. But theories, intellectual systems, notions about what is desirable and what is undesirable, may themselves create demands or determine their direction. Ideas and books have played their share in the drama of government. Locke, Montesquieu, Rousseau were thinkers who greatly affected

action. They determined political forces; they did not merely articulate them. Yet even these men were expressive of their times; they did not derive their views from abstractions. It is not without significance that the most profound contribution to political thought in America, namely, the *Federalist,* was not the work of doctrinaire thinkers but of men of affairs. The *Federalist* was a lawyer's brief by the framers of the Constitution in support of their handiwork.

Solid thinking about politics demands an essential measure of disinterestedness and detachment. But it must not be detached from the circumstances of time and place which condition government. Nor must the disinterestedness of the thinker fail to take into account those human interests here and now, the accommodation of which is the essential task of politics. I shall therefore put on one side all abstract or *a priori* speculations about the state, its scope and limits. Let us dismiss all vague and uncritical assumptions about the "American system of government" or "American traditions." Nor will it help us much to invoke the old slogan of individualism or its modern rival

socialization, or even its harsher variant socialism. These slogans mean nothing because they convey so many contradictory ideas. Instead, let me ask you to bring into sharp focus what it is that a modern state like our own government is actually called upon to do. Before we can consider the aptness of political ideas or the adequacy of political machinery, the relevance of past experience or the promise of new proposals, we must be fully alive to what might be called the raw material of politics—the nature and extent of the demands made upon the machinery of government, and the environment in which it moves. I deem it therefore important to repeat thrice-told tales and to remind you of what is so familiar as to be frequently forgotten.

Startling transformations in the outward face of society are taking place under our very eyes. The great material inventions that are giving life itself the aspect of a cinematograph are innovations of today, at most of yesterday. These new material forces and devices are having their reflex upon finance, upon industrial organization, upon law and government, upon the manner of man's thoughts in ways and to

an extent that we have hardly begun to understand. Because of these swiftly moving changes of today, there is an illusion that the society which preceded airplanes and television had always been, relatively speaking, the same, and presented therefore the same situations to government. In our own day we make such rapid adjustments to drastic novelties in the world of matter, that we do not take in the full significance of the profoundly far-reaching changes that have occurred within the last century, and their effect upon the tasks of government.

Let me recall a few aspects of the society of a hundred years ago, compared with our own, in those manifestations which inevitably impinge upon politics. Consider the nature of the community over which government exercises control. I put aside for the moment the mere problem of size—the fact that our national government rules a continent. This element of size is perhaps the single most important fact about our government and its perplexities. It conditions interests, opinion, administrative capacity. But it raises issues that demand a separate series of essays. My immediate concern is with the distribution of the population

upon which depends the nature of its interconnections, the extent and intensity of its social problems. The population of the entire Union, in 1790, was 3,929,625. There were only six towns with a population of 8,000 or over, making a total urban population of 131,472 or a little over 3% of the whole. The fifth census in 1830 reported 12,866,020 people in the United States, with twenty towns of over 8,000, and an urban population of 864,509, not quite 7% of the entire population. By 1880, the population had grown beyond 50,000,000, of which 22.7%, or more than 11,000,000, dwelt in 286 towns. This constant shift to the cities and the very big cities, steadily grew until the 1920 census found 46,307,640 people, or 43.8%, of the total population of 105,710,620, living in 924 cities. One may safely forecast that the 1930 census will show a still greater concentration of city life. In fact, to a considerable measure, the United State is in process of becoming a congeries of metropolitan areas.

Brief summaries of two other powerful developments combining with city growth both as cause and effect, may also be suggestive. Up to 1870 there had been taken out since the United

States began, 120,573 patents. From 1870 to 1911 alone there were issued over a million patents. Translate, if you will, these dry figures into the warp and woof of our dynamic industrial system. Again, in 1850, there were only 9,000 miles of railroad in the United States. When the Civil War broke out, there were 30,000. By 1910, we had reached the limit of railroad expansion in a total of 250,000 miles.

To novelist and critic, moralist and educator, the influence of this urban and industrial concentration upon our whole culture furnishes themes for endless speculation. To the student of government, its effects upon the operations of government are unmistakable.

I shall not attempt a survey of all the activities of government but shall confine myself to lawmaking. Legislation is the most sensitive reflex of politics. It is most responsive to public needs and public feelings, and largely determines the orbit within which the judiciary and the executive move. What government today is called upon to do will appear most vividly from its comparison with the business of government in the early days of the Union. To this end, I shall make a brief survey of the volume and

content of legislation for five early years by the Congress of the United States, and by the legislatures of Connecticut, Massachusetts, and New York. This early legislative picture I shall put alongside the stuff and scope of present-day legislation. We shall then have not speculation about government, not theories of what it should and should not be, but an inventory of what it does, leading to a consideration of how it works and the forces it encounters.

All the laws passed by Congress for the first five years are contained in a single volume of 320 octavo pages. There were twenty-six acts passed in the 1789 session, sixty-six in the session of 1790, ninety-four in 1791, thirty-eight in 1792, and sixty-three in 1793. And these were the years when the new government was put on its feet, the whole machinery for its existence devised. For a single session of the Seventieth Congress there were 993 enactments, contained in a mastodontic volume of 1,014 pages, quarto not octavo!

The bulk of this early congressional legislation concerned the creation of executive departments and the details for carrying on the government. The legislation dealt with the

treasury, the judiciary, foreign affairs and war, and their administration. Taxes and methods for collecting them required laws, and the first of our great public utilities, the Post Office, was established. As aids to the foregoing, record systems were provided and the Bank of the United States was established. Congress also had to legislate for the vast unsettled territories, and from time to time created new states. Navigation received attention through numerous laws dealing with lighthouses, beacons, buoys, and public piers. A patent law had early passage and the decennial census had its beginning. The Revolutionary War, like all wars, led to many pension laws. In fact, government bounties, pensions, land grants, provisions for government officials, formed the subject matter of a large proportion of the total legislation. Apart from taxes and tariffs, the regulation of fisheries, and measures dealing with the coastwise trade, there was hardly any manifestation of active intervention by government in the affairs of men.

The New York laws for the period from 1789 to 1793 embraced about 60 acts a year, in a total of 479 pages. For 1926 and 1928, the New

York Legislature passed, respectively, 851 and 875 laws recorded in 1,577 pages for 1926, and for 1928, in 1,822 pages. In the early period, the organization of local communities—defining limits of counties and municipalities—and the establishment of administrative authority appear to be the chief business of the legislature. There are episodic statutes affecting individuals, such as naturalization of aliens, confirmation of titles to grants of land, and formation of individuals into associations, religious as well as commercial. We see the emergence in a very primitive way of modern corporate enterprise, but very primitive it is. The old common law, that strange but wonderful coral reef of legal rules and doctrines and ways of settling controversies between men which was the deposit largely of the seventeenth and eighteenth centuries, was hardly changed by legislation. Here and there the rigidities of procedure were softened, and in the relief of debtors from the cruelties of imprisonment are found early intimations of the humanistic influences which later were to make themselves so vigorously felt in behalf of those less fortunately circumstanced.

We now come to phases of state laws for which, in the early days of Congress, there were no federal analogues. Those activities of government that are known as the police power, namely, the promotion of morals, health, and the public welfare, were quite outside the historic scope of the national government. Indeed, the extent to which the federal government may or should make use of national powers for the promotion of what are deemed to be more or less local interests is still one of the most bristling of constitutional and political controversies. A hundred years ago there were strong legal and political resistances to the intervention of federal authority into matters outside of its narrowly conceived scope, though in the promotion of local improvement through public roads the strict legal theory early yielded to pressure of need.

The states were the legal repositories for local police purposes. From the beginning we find measures dealing with health, with morals, and more generally with the promotion of public welfare. But the field of these enactments was extremely restricted. They dealt with simple situations in a simple way, most frequently for-

bidding whatever mischief revealed itself as needing more than individual corrective. They were indeed police measures in the very limited meaning of police. For the most part, they constitute a catalogue of thou-shalt-nots; they represent the minimum functions of the state in keeping the peace, in forbidding nuisances, in safeguarding against fraud, in providing for common standards of measurement, and regulating traffic. Government kept the ring within which men carried on their pursuits and provided the few services which in those days individuals did not furnish themselves. The interdependencies of men were relatively narrow, and there was no conception of the state as an active promoter of civilization. There was one important exception. The American governments were secular, and from the very beginning education was one of the chief responsibilities of government.

This general picture may gain in concreteness by reference to some of the specific measures that occupied the attention of the early New York Legislatures. As we turn the pages of the statutes, we find an act "concerning stray cattle and sheep," followed by an act "to prevent the

odious practice of digging up and removing for the purpose of dissection, dead bodies, interred in cemeteries," followed by an act "for the better cleaning, regulating and further laying out, public highways, in Suffolk County, Kings County and Queens County." There is an act to encourage the raising of sheep and to prevent injury by dogs, and another act for the preservation of heath hens in the County of Suffolk. Traffic problems have apparently always been with us. Many acts regulate traffic on highways and bridges, and others deal with ferriage, as between the City of New York and the Island of Nassau. Similarly, there are acts against obstruction to docks and wharves, and for the improving of river navigation. One notes feeble precursors of modern pure food and drugs acts and legislation fixing commodity standards, in provisions for the inspection of beef and pork packed in barrels for exportation, and laws for the inspection of sole leather in the City of Albany and later in the City of Hudson. Here and there are crude instances of the encouragement of individual enterprise, through loan or bounty for promoting the manufacture of earthenware, hemp, cotton, linen, and

glass. Not a little legislation is concerned with maintenance of the poor. So, also, there are measures for the prevention of fire in the City of New York, and for the support of a hospital. The vast network of modern regulations for the licensing of professions and callings has a beginning in an act "to regulate the practice of physic and surgery" in the City of New York. Liquor and politics made very early acquaintance, and we find "an Act to restrain the immoderate use of spirituous liquors in the gaols in the cities and counties of New York and Albany." There is bracing attention to higher learning by grants of lands to Columbia College, by the establishment of a college of physicians and surgeons, and by the incorporation of trustees for a public library.

Let us turn to Connecticut. For the first five-year period of our national existence, the entire product of Connecticut lawmaking is found in fifty-three pages. As against these fifty-three pages for a five-year period, the Connecticut statutes for 1925, 1927, and 1929 required, respectively, 343, 329, and 352 pages. Compared with other states, the Connecticut legislators are modest in their output. What of the range

of Connecticut legislation? In the main, the scope and distribution of legislative topics in the early days of Connecticut resemble those we have found in New York. The duties of officials and the management of localities are the chief staples of legislative concern. Law after law deals with the powers of this or that minor official, the creation of towns, and the settlement of local boundaries. Some attention has to be given, of course, to the machinery of the state government, and there is occasional legislation concerning private law, namely, the rights and duties of individuals. In those early days, legislation often disposed of controversies which are now settled in the courts.

Our survey of the New York legislation leads us to expect a very narrow employment of the powers of government for creative purposes by the early legislatures of Connecticut. Fishing is regulated, and provisions are made to keep navigation free from obstruction. Lines of communication are kept open by regulation of ferries and provisions for repair of highways and roads, the erection of signposts, the removal and prevention of nuisances on land and water. Fields and fences and meadowlands are frequent

topics of those simple days. Connecticut's early leaning toward the promotion of home industry is evinced by bounties for woolen manufacture. Sheep raising was encouraged by bounty as well as by measures against the ravages of wolves. There are patriotic provisions on behalf of disabled soldiers and seamen, and the interests of morality and thrift are vindicated by laws against gaming. How profoundly different the society of Connecticut was at the end of the eighteenth century from what it is today is attested by acts against the importation of convicts, and for the prevention of the slave trade!

Finally, let us turn to Massachusetts, as the largest New England state and perhaps as alert and thriving as any of the Commonwealths when the Union began. We may be sure that Massachusetts legislation is a fair index to the demands made by its citizens upon government. For the quinquennium under review, about seventy enactments a year came out of the General Court, together with numerous resolves, which are mostly directions or advices to officials and responses to diverse petitions by citizens. For the five years beginning with 1789, the whole sphere of legislation was covered,

respectively, in 119, 82, 109, 133, and 159 pages. For the years 1926 and 1928, 398 and 406 laws were added to the vast accumulation of existing legislation, requiring 502 and 584 pages for their expression. Like New York and Connecticut, the Massachusetts General Court was mostly concerned with technical administration and the machinery of local self-government. The narrow scope of the legislation and its cozy local character are illustrated in numerous special acts by which individuals and their estates were annexed to, or separated from, towns and counties. Thus, there was "an Act to annex Jabez Briggs and Giddeon Gould with a certain gore of land, to the town of Sutton in the County of Worcester," while another act was passed "for setting off Benjamin Chase, his family and estate from the town of Freeport and Annexing them to the town of Brunswick." Needless to say, parishes, churches, and religious societies constantly appear in these legislative pages. There are enactments dealing with the structure of the state government, and we find the same limited range of legislation affecting individuals as disclosed by New York and Connecticut, namely, naturalization of aliens,

settlement of doubtful titles to land, relief of people committed to prison for debt, and occasional changes in legal procedure.

In its promotion of definite social policies, the Massachusetts General Court reflected the then generally limited scope of governmental interference. But within its confined area, it touched the diversified interests of the Commonwealth. Fisheries seem to have received the chief protection, and especially the fish called alewife. There were not less than twenty-seven acts within five years for the protection of these fish in different streams, sometimes singly and sometimes in the company of shad and salmon. There are the usual measures for the protection and improvement of navigation in various waters, and many laws for the use of bridges and the construction of locks, canals, and highways. Indeed, the promotion of communication appears to be the dominant interest of society to be furthered by government. There are, of course, minor measures for the encouragement of agriculture and industry. I am bound to report among these an act "to encourage the manufacture and consumption of strong beer, ale and other malty liquors." Morals and

opinion change, as well as economic circumstances! There were acts dealing with other enterprises, some of which have disappeared, like the manufacture of strong beer, but for different reasons. Thus, the early Massachusetts legislators dealt with the exportation of flaxseed, the protection of sheep and oysters, the encouragement of the fur trade, and the manufacture of nails. The growth of wood and timber was promoted; so, also, the manufacture of glass within the Commonwealth, and standards were set for the quality of stone lime and for the size of lime casks. There are various health measures, of which some recall the extent to which smallpox was a scourge a century ago. Several acts reflect a humaner attitude toward criminals. Finally, learning and culture were promoted by the establishment of "academies," and by the incorporation of the Massachusetts Historical Society.

The greatest of legal historians has admonished us that history is a seamless web. The stream of events cannot be broken into definite epochs without artificiality and distortion. Nevertheless, one may mark McKinley's administration as the end of a period of *laissez*

faire—the termination of a narrow and negative conception of government—and the entry of government into all the secular affairs of society. Following the Civil War there was an almost magical industrial growth. Radiating railroads are the muscles which have pulled into an articulate body the detached and sprawling members of our great domain. A vast nervous system of telephones and telegraphs and wireless has, on the surface at least, electrified the scattered regions of the country into a self-conscious whole. The concentration of life in big cities has made of them working ganglia of the nation. A relatively homogeneous population with restricted disparities of wealth, has been transformed into a cumbersome democracy drawn from many peoples, containing some forty million wage earners, with great inequalities in wealth and increasing pressure of conflicting interests. Vast physical forces have produced great social changes. They have been fertilized by theories concerning man and society. Radical ideas let loose by the American Revolution, the French Revolution, the revolutionary movements of 1848, have slowly but profoundly affected men's desires and their de-

mands upon government. All this ferment has been greatly reinforced by the dissolving consequences of the World War. The Great Society, with its permeating influence of technology, large-scale industry, progressive urbanization, accentuation of groups and group interests, presses its problems upon government.

I recall these elementary facts precisely because we are too prone to dissociate problems of law and government from the general texture of society. The tasks of government have meaning only as they are set in the perspective of the forces outside government. Modern society is substantially reflected in legislation. Roosevelt's "big stick" was wielded largely to secure from Congress legislation to control Big Business and to promote social legislation. Government is no longer merely to keep the ring, to be a policeman, to secure the observance of elementary decencies. It is now looked upon as one of the energies of civilization. It is being drawn upon for all the great ends of society.

Beginning with Roosevelt's days, there has been exuberant efflorescence of congressional lawmaking. The Safety Appliance Act, the Hours of Service Law, an invigorated Interstate

Commerce Act, the Pure Food and Drugs Act, the Meat Inspection Law, the Harrison Anti-Narcotic Act, the Mann Act, the Federal Employers' Liability Act, the Transportation Law, the Packers and Stockyards Act, the Grain Futures Act, are only a partial recital of the legislative product of a generation. With increasing impact, taxation has been utilized not as an irreducible exaction from citizens for the irreducible costs of government, but as an instrument of social policy, and more particularly as a conscious control in the distribution of wealth. Since 1900, successive Presidents of the United States have been inveighing against government by commission, while at the same time, we have had a steady extension of commissions. To them vast powers have been intrusted which heretofore had not been exercised by government at all, or when exercised, had been vested in courts and Congress. The establishment of the Interstate Commerce Commission in 1887, with a mild sweep of powers, dates the break with the simplicities of the past; it begins the new era of governmental regulation and administrative control.

Active regulation, erected by Roosevelt into

a political philosophy, has been pursued by all succeeding Presidents. Whatever may have been their traditional theories and their political prejudices, in practice each President has been an instrument of forces greater than either. Before he was President, Wilson rebuked government by commission. As President, he added his signature to more enactments for the regulation of business and conduct through boards and commissions than did Roosevelt. Harding entered the Presidency with two dicta: that government, after all, is a very simple thing and that what was needed was more business in government and less government in business. How deeply he was disillusioned of his romantic notion concerning the simplicity of government, we can only surmise. But it is a matter of history that he found that while government could keep out business, business could not keep out government. Nor was the extension of governmental activity curtailed or arrested in the Coolidge era, however much it may have conflicted with Coolidge's theories of government. Finally, Herbert Hoover, who has put his philosophy of individualism into a book and who directed one of his few campaign speeches against socialism,

marked the first year of his administration by the creation of the most far-reaching political machinery for economic purposes and the most daring attempt, certainly in peace times, to control the free play of economic forces.

The Interstate Commerce Commission with its tight grip on railroads, telephones, telegraphs, and pipe lines; the Federal Reserve Board created in 1913 to regulate the delicate fiscal mechanism of the country; the Federal Trade Commission established in 1913; the Federal Tariff Commission of 1916; the Federal Farm Loan Board, the beginning of active measures for the relief of agriculture; the Federal Water Power Commission around which will center some of the basic problems of the years to come; the Federal Radio Commission in 1927; and finally the Hoover Farm Board of 1929 with its appropriation of $500,000,000—all imply a breadth and depth of governmental activities that make the tasks of government today really different in kind and not merely in degree from those that confronted government a hundred years ago. There are wholly new interactions between citizen and government. Difficulties and perplexities are thereby thrown

upon President, Congress, and courts, which give the problems of statecraft a hundred years ago the air of Arcadian simplicity. And I have simplified the complexities by not taking into account our foreign and oversea affairs and the extent to which national policies are inevitably entangled in international relations.

There is something touching about the Congressman who only the other day introduced a joint resolution for a Commission on Centralization which is to report "whether in its opinion the Government has departed from the concept of the founding fathers" and "what steps, if any, should be taken to restore the government to its original purposes and sphere of activity. . . ."[4] One suspects that the Congressman is descended from King Canute and Mrs. Partington. But he is merely ingenuously acting upon a view of government which Presidents and eminent lawyers and leading industrialists voice from time to time, unmindful of the facts which have made such views the cry for the return of the stagecoach and the peaceful countryside.

While the energies of the federal government have thus expanded since their origin beyond

all recognition, the activity of the states has not contracted. Undoubtedly many transactions within a state now touch commerce outside it, so as to give a national aspect to what in earlier days had merely local meaning. Thus, it has come to pass that through the Commerce Clause of the Constitution, national laws and national administration have vastly extended their sway. But what is left to the states and undertaken by them, affects the center and circumference of affairs. In the unexciting pages of contemporary session laws, one finds that nothing that is human is alien to the legislator. Callings are regulated, conduct is prescribed and proscribed. Private enterprise is subjected to a network of public control. Practically the whole gamut of economic enterprise is under the state's scrutiny by an intricate administrative system of licenses, certificates, permits, orders, awards, and what not.

The *Index to State Legislation* recently published by the Congressional Library reads like an inventory of all of man's secular needs and the means for their fulfilment. Thus, under the heading of food alone, one finds legislation regulating bakers and confectioners, beverages,

canneries, cold storage, commission merchants, dairy products, eggs, fish, flour and meal, frogs and turtles, fruits, game, grain, hay and straw, ice cream, kosher food, markets, meats, nuts, restaurants, saccharin, salt, vegetables, and vinegar. In addition there are laws fixing standards for apples, dairy products, fruits and vegetables, cottonseed, canned fruit, condensed milk, butter and cheese, anthracite coal, grapes, grain, gasoline, oil, fertilizer, maple syrup, and a host of other commodities. There are statutes regulating advertisements, and blue sky laws for the protection of the investing public. Workmen's compensation acts have practically everywhere replaced the inadequacies of the common law of master and servant. This is only one aspect of the gradual reliance upon the principle of insurance for many problems engendered by modern industry. In its relation to unemployment, it is part of the movement for enforcing minimum social standards through government. This is the ultimate philosophy behind the great body of industrial legislation. Again, the early simple regulation of gas and water companies has expanded into the intricacies of modern utility regulation. Many conflicting interests

have to be reconciled, and intricate technical problems to be solved. Here we touch some of the most perplexing and contentious problems of modern government which we shall later consider in detail. Suffice it to say that through its regulation of those tremendous human and financial interests which we call public utilities, the government may in large measure determine the whole social-economic direction of the future. The most acute aspect of this problem arises in connection with the development of electric power and the profound implications of power upon the country's development. Law and legislation must deal with a world transformed by engineering science.

Even subtler intellectual and spiritual forces confront modern government when faced with the problems presented by the movie and the radio. As to movies, some states have already met these demands by commissions regulating the conditions of exhibition and have attempted to formulate moral standards. Broadcasting over the continent is regulated by a national commission. But who will say that we have even begun to analyze the nature of the problems presented by radio and movie?

Is it any wonder that dissatisfaction with the law is widely entertained and that we both resent legislation and appeal to it?

The real difficulty appears to be [I quote from Senator Root] that the new conditions incident to the extraordinary industrial development of the last half-century are continuously and progressively demanding the readjustment of the relations between great bodies of men and the establishment of new legal rights and obligations not contemplated when existing laws were passed or existing limitations upon the powers of government were prescribed in our Constitution. In place of the old individual independence of life in which every intelligent and healthy citizen was competent to take care of himself and his family we have come to a high degree of interdependence in which the greater part of our people have to rely for all the necessities of life upon the systematized coöperation of a vast number of other men working through complicated industrial and commercial machinery. Instead of the completeness of individual effort working out its own results in obtaining food and clothing and shelter we have specialization and division of labor which leaves each individual unable to apply his industry and intelligence except in coöperation with a great number of others whose activity conjoined to his is

necessary to produce any useful result. Instead of the give and take of free individual contract, the tremendous power of organization has combined great aggregations of capital in enormous industrial establishments working through vast agencies of commerce and employing great masses of men in movements of production and transportation and trade, so great in the mass that each individual concerned in them is quite helpless by himself. The relations between the employer and the employed, between the owners of aggregated capital and the units of organized labor, between the small producer, the small trader, the consumer, and the great transporting and manufacturing and distributing agencies, all present new questions for the solution of which the old reliance upon the free action of individual wills appears quite inadequate. And in many directions the intervention of that organized control which we call government seems necessary to produce the same result of justice and right conduct which obtained through the attrition of individuals before the new conditions arose.[5]

Political man has on the whole merely the limited resources of the past. In native intelligence we can hardly be said to excel Aristotle, and in the field of political ideas man's inventive powers have been pitiably meager. Not only

have the burdens cast upon politics immeasurably increased; the environment within which politics operates immensely increases the difficulties. Pitiless publicity has its beneficial aspects. But when everything is done under blare and noise, the deliberative process is impaired and government becomes too susceptible to quick feeling. It is, I believe, of deep significance that the Constitution of the United States was written behind closed doors, and it is well to remember that earth was thrown on the streets of Philadelphia to protect the convention from the noise of traffic. Again, we talk glibly about the annihilation of distance, and in many ways we do gain from speed of communication. But we must not overlook the moral cost of these triumphs of science. The mobility of words at the present time brings in its train what might be called immobility of reflection. The extent and influence of the conscious manipulation of these forces by movies, chain newspapers, and lobbying organizations are still obscure. That these constitute powerful elements in the complexities of modern government, no one will gainsay. The interplay between government and the complicated structure of industrial society

demands as never before men of independence and disinterestedness in public life. You remember the rôle of a legislator as Burke conceived it. "Your representative owes you," he told his constituents, "not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion."[6] Against this responsible exercise of judgment, the whole current of American life is unconsciously in conspiracy. A thousand pressures dissipate the energies and confuse the judgment of public men. The tasks society lays upon them make heavy demands upon wisdom and omniscience. Yet most public men are too distracted to acquire mastery of any political problem and seldom feel free to give us the guidance even of their meager wisdom.

All I have said is indeed merely a laborious reminder of some of the basic conditions of contemporary government. If the attempt to define our political problems more sharply needs justification, I offer the familiar words of Lincoln: "If we could first know *where* we are, and *whither* we are tending, we could then better judge *what* to do, and *how* to do it."[7]

II

Does Law Obstruct Government?

YOUTH is usually offered as the comforting explanation for our inadequacies. But for grappling with the tasks which the Great Society throws upon modern government, the political youth of the country is our greatest advantage. Time makes for beauty; it also makes for ingrained traditions that yield not readily to new conditions. Our recent origin has saved us from those tenacious resistances to political adaptations which come from a system of rigid social stratifications. It has given us a fluid society. To the bounteous economic resources of the country must be added this freedom from the undue weight of the past to help us in working out a civilized and humane society. Lack of imagination, of disinterestedness, of courage, and above all inertia are here, as elsewhere, the enemies of reason and progress. But with us, at least, these retarding forces are not regimented into classes. The prestige of history and the habits of subservience are not enlisted against reform.

But while the nation is young, its constitution is old. The stability of our legal structure is strikingly emphasized by the mutability of other constitutional systems. The labor of the fifty-five men who, in 1787, devised the charter of government for a union of the thirteen states, has survived the rise and fall of the German Empire, has seen the pendulum in Russia swing from an extremist autocratic to an extremist proletarian *régime,* and in France has witnessed republic displace monarchy and monarchy supplant republic until, in 1875, the present durable republic was established. The tenuous government fashioned in Philadelphia itself helped to dismember that crazy quilt of nationalities, the Habsburg monarchy, and to make of its severed pieces new states with modern constitutions that show very little the influence of our own. The unchanging East has profoundly changed, so that the most recent constitutions come out of the Orient.

The rest of the English-speaking world is, politically speaking, *nouveau riche* by comparison with the United States. The Constitution of Great Britain is, of course, not to be found in a single document. But those enactments, un-

derstandings, practices, and arrangements which comprehend the British Constitution are decisively different today from what they were when the colonies won their independence. How great the differences, we see vividly in Mr. L. B. Namier's recent fascinating book on the *Structure of Politics at the Accession of George III*. A transformation from rule by a small group of powerful families, with considerable political authority directly exercised by the King, to government by a committee of the Labor Party, sustained through its support by the popular House, reflects profoundly revolutionary constitutional changes, the more impressive because achieved without bloodshed. Moreover, in the same period the British Empire has quietly but radically evolved from an old-fashioned empire into a federation of peoples, accurately described by its current title, the British Commonwealth of Nations.

The various nations comprising this Commonwealth are themselves under constitutions expressive of their peculiar needs. In form these constitutions are Acts of Parliament at Westminster. In fact, the Dominions are their own masters. They determine their constitutional

structure and the terms of their association with the other members of the family of British nations. The organic acts of all the Dominions are of recent date. Our Constitution, by comparison, is an ancient document. The oldest, New Zealand's Constitution, dates from 1852. The Dominion of Canada came into being by the British North America Act of 1867. The union of states which created the Commonwealth of Australia was accomplished by the Commonwealth of Australia Act of 1900. Thanks to the high statesmanship of Campbell-Bannerman, the miserable Boer War was atoned for by the Act of 1909, establishing the Union of South Africa. Finally, in 1922, the Irish Free State Constitution Act terminated, one hopes forever, the feud of centuries.

We cannot be too often reminded that constitutions are not literary compositions but ways of ordering society. This lesson is reinforced by the use the British Dominions have made of our Constitution. Canada was framing her organic act while civil war was rending the United States. The essential experience Canadians drew from that conflict was the weakness of the American system due to the authority

exercised by the states. Canada therefore reversed the scheme of distribution of political power in the American Constitution by giving narrowly defined power to the Provinces, leaving the vast residuum of control to the Dominion. On the other hand, thirty years later, Australia was more concerned to maintain the autonomy of her individual states. So she followed closely our own scheme for dividing authority between states and nation. Emerging from a bloody internal conflict, South Africa felt the need of a legislative union with recognition of local interests through local legislatures, and fashioned a government imitative neither of Canada nor of Australia. These three Dominions and the United States show how pliable and resourceful is the principle of federalism. Variants of the principle are devised at different times, under diverse conditions, and for different people.

The Constitution of the United States thus appears as a strange phenomenon of permanence. The formal changes have been few in number and have not very seriously affected its structure. The Sixteenth Amendent, which en-

ables the federal government to levy income taxes without apportionment according to population, gave the national government power of immense practical significance. Indeed, it is hard to see how the World War could have been carried on without resort to income taxes, nor how the government could today meet its four-billion-dollar budgets if incomes were immune from taxation. But the Sixteenth Amendment was not really an innovation, nor did it disturb the balance between states and nation. In fact, it only restored a power which the federal government from time to time had exercised for a hundred years, but which a divided Supreme Court, in 1895, in the much criticized *Income Tax Cases,*[8] unexpectedly denied to the country. The election of United States Senators by popular vote instead of through legislatures, and the extension of the franchise to women were both inevitable evolutions of the democratic idea. Undoubtedly, they have unsettled old political patterns and have introduced factors as yet incalculable in the balance of political forces. But it can hardly be maintained that these are changes which have affected the con-

stitutional structure of the country or have modified the distribution of power as between states and nation.

The Eighteenth Amendment, however, marks the entry of the federal government into matters traditionally reserved to the states and in other ways may have far-reaching influences upon our federal system. But the effects of prohibition upon our constitutional system are still matters of speculation.

The clue to statesmanship in regard to prohibition lies in President Hoover's characterization of it as an "experiment." As such it should be freely tested by its results and not be erected into a religious dogma intrusted to the zealous keeping of any church. A social policy whose adoption was opposed by two Presidents of the United States cannot be immune from reconsideration. That prohibition has been a potent ally of crime and a promoter of widespread political corruption, judicial records too amply testify. To what extent the feeling for all law is attenuated by nation-wide disregard of one law, no man can measure. Only fanatics will deny that the integrity of American social life is tarnished and confused by the hypocrisies due to prohibi-

tion. The Eighteenth Amendment has enmeshed the country in difficulties from which it cannot quickly or easily be disentangled. But we must reject prohibition as a shirt of Nessus. Guided by the test of social utility or workability under a federal system spanning a continent, the United States will not be wanting in legal and administrative resources to bring law into conformity with truth and the diverse needs of a hundred and twenty millions of people, provided the nettle of prohibition is seized with candor and courage.

The Eighteenth Amendment apart, only the Civil War amendments radically modified our constitutional arrangements. The termination of slavery and the participation of the Negro in the free life of the nation mark political changes of stupendous meaning. But even more important consequences, perhaps, flow from the new subjection of the states to national control through the effectual veto power exercised by the Supreme Court over state legislation. The vague words of the Fourteenth Amendment furnish the excuse for this immense power: "No State . . . shall . . . deprive any person of life, liberty, or property, without due process

of law; nor deny to any person within its jurisdiction the equal protection of the laws." The constitutional innovations of the Fourteenth Amendment coincided with railroad and other utility development, with the emergence of modern large-scale industry and the exploitation of natural resources. These in turn provoked the movements for public control of business and social legislation, which were in large measure successfully resisted or unduly postponed. It was the period when *laissez faire* was the dominant economic-social philosophy —the period between Grant and Roosevelt. The Fourteenth Amendment was made the vehicle for writing *laissez faire* into the Constitution. In one of his addresses, Mr. Justice Holmes thus characterized this period:

> When twenty years ago a vague terror went over the earth and the word socialism began to be heard, I thought and still think that fear was translated into doctrines that had no proper place in the Constitution or the common law.[9]

In the eighties and nineties, society was in process of drastic transformation, but members of the Supreme Court continued to reflect the

social and economic order in which they grew up. They sought to stereotype ephemeral facts into legal absolutes. As a result, abstract conceptions concerning "liberty of contract" were erected into constitutional dogmas in the United States, while in England the same notions had already been rejected, even by conservative statesmen, as inapplicable to modern conditions. As long ago as 1884, Lord Randolph Churchill thus wrote to a constituent:

> In answer to your question as to my views on the rights of contract I beg to inform you that where it can be clearly shown that genuine freedom of contract exists I am quite averse to State interference, so long as the contract in question may be either moral or legal. I will never, however, be a party to wrong and injustice, however much the banner of freedom of contract may be waved for the purpose of scaring those who may wish to bring relief. The good of the State, in my opinion, stands far above freedom of contract; and when these two forces clash, the latter will have to submit. If you will study the course of legislation during the last fifty years, you will find that the Tory party have interfered with and restricted quite as largely freedom of contract as the liberals have done.[10]

Yet as late as 1905, in the *Lochner*[11] case, a divided Supreme Court declared it beyond the power of a state to limit the working hours of bakers to ten! The tide of Supreme Court hostility to legislation reached its crest in the *Lochner* case. There followed a period of judicial recession, of greater tolerance toward the exercise of legislative discretion. Between 1908 and the World War, the Court allowed legislation to prevail which curbed excesses of economic power and recognized the impotence of individual bargaining within a large area of industrial relations. But those who had hoped that this deeper insight of the Court into the realities of modern society would endure, were to be disappointed. Changes in the Court's personnel and the pressure of post-war economic and social views soon reflected themselves in decisions. It was the period of President Coolidge's dictum that "the business of America is business." The last decade again became a period dominated by fears, and these fears again registered as Supreme Court decisions.

Along the whole gamut of legislative activity, the Supreme Court has interposed its veto against state action in matters confessedly of

local concern, dealing solely with local situations, and expressing remedies derived from local experience. Since 1920 the Court has invalidated more such legislation than in the fifty years preceding. Views that were antiquated twenty-five years ago have been resurrected in decisions nullifying minimum wage laws for women in industry, a standard-weight bread law to protect buyers from short weights and honest dealers from unfair competition, a law controlling the abuses of theater ticket scalpers, laws controlling exploitation of the unemployed by employment agencies, laws regulating public utilities, and many tax laws. And always by a divided Court, always over the protest of its most distinguished minds! To which it may be replied that the Supreme Court sustains many more laws than it nullifies. Since 1921 the Court has found legislation offensive to the requirements of due process in about thirty per cent of the cases. From 1926 to 1929, the percentage is even higher. It held valid twenty-five laws and invalid fourteen. In thirty-six per cent of the cases that came before it, it found constitutional barriers to legislation.

From the point of view merely of statistics,

this is an impressive mortality rate. But a numerical tally of the cases does not tell the tale. In the first place, all laws are not of the same importance. Secondly, a single decision may decide the fate of a great body of legislation. Examples of such far-reaching consequences are the decisions invalidating the Kansas law which was directed against coercion of workers from joining trade-unions, and the law of the District of Columbia aiming to secure decent wages for women workers who have not the power of economic self-protection. Similarly, a single decision involving valuation of utilities may affect utility valuations in every state and every city of the Union. Moreover, the discouragement of legislative effort through an adverse decision and a general weakening of the sense of legislative responsibility, are influences not measurable by statistics.

The states need the amplest scope for energy and individuality in dealing with the myriad problems created by our complex industrial civilization. They need wide latitude in devising ways and means for paying the bills of society and in using taxation as an instrument of social policy. Taxation is never palatable, and

its exercise should not be subjected to finicky or pedantic arguments based on abstractions. No amount of constitutional metaphysics about "valuation" can conceal the fact that judicial review of utility regulation involves the exercise of practical judgment in the adjustment of clashing economic and social interests. Again, in dealing with such assertions of state power as are involved in excess condemnation, judges nominally decide the legal question of what constitutes a "public purpose," but high-sounding generalities only cover up the process of specific judgment. Time and place and local needs, above all the considerations that make for a civilized community, should govern. Essentially, these are the concern of local legislatures. For government means experimentation. To be sure, constitutional limitations confine the area of experiment. But these limitations are not self-defining and were intended to permit government. Opportunity must be allowed for vindicating reasonable belief by experience. The very notion of our federalism calls for the free play of local diversity in dealing with local problems. Mr. Justice Holmes has put in enduring form the basic objection to the imposition by

judges of their private notions of social policy upon the forty-eight states:

> There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect.[12a]

The veto power of the Supreme Court over the social-economic legislation of the states, thus exercised through the due process clause, is the most vulnerable aspect of undue centralization. It is at once the most destructive and the least responsible: the most destructive, because judicial nullification on grounds of constitutionality stops experimentation at its source, and bars increase to the fund of social knowledge by scientific tests of trial and error; the least responsible, because it so often turns on the fortuitous circumstances which determine a majority decision and shelters the fallible judgment of individual Justices, in matters of fact and opinion not peculiarly within the special

competence of judges, behind the impersonal dooms of the Constitution. The inclination of a single Justice or two, the tip of his mind or of his fears, may determine the opportunity of a much needed social experiment to survive, or may frustrate for a long time intelligent attempts to deal with a social evil.

For the general scheme of our constitutional system there is deep acquiescence and even attachment. One hears occasionally loose talk that our form of government is an anachronism, and dissatisfaction with some act of government or some failure to act is vaguely charged against our constitutional mechanism. But much more significant than these expressions of episodic discontent is the absence of any widespread or sustained demand for a general revision of our Constitution.

In Australia, on the other hand, it had been urged for some time that the experience of a quarter of a century of the working of its Constitution should be canvassed, and disclosed defects remedied by a general revision. Since the Australian Parliament possesses no power to legislate for a constitutional convention such as that which brought forth their Constitution

as well as ours, the Australian Government in 1927 appointed a Royal Commission "to inquire into and report upon the powers of the Commonwealth under the Constitution and the working of the Constitution since Federation; to recommend constitutional changes considered to be desirable" and to report upon the constitutional aspects of ten specified subjects. After two years' labor, the Commission recently reported on the workings of the Constitution since 1901, with specific recommendations for the application of the federal idea to contemporary Australia.[12b] We have felt no such pressure for self-scrutiny. Apart from some of the far-reaching proposals for revamping the Constitution as a means of averting the Civil War, there has been no substantial body of opinion, certainly in recent times, for a reëxamination of the fitness of the Constitution to our needs.

Such constitutional longevity is one more proof that experience often contradicts the best of abstract reasoning. In a well-known letter, Jefferson explained why constitutions cannot be expected to endure:

> I am certainly not an advocate for frequent and

untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.[13]

Building on his desire for having institutions "keep pace with the times," he went on with this specific prescription to friends who were embarking upon constitution-making in Virginia:

. . . let us provide in our constitution for its revision at stated periods. What these periods should be, nature herself indicates. By the European tables of mortality, of the adults living at any one moment of time, a majority will be dead in about nineteen years. At the end of that period, then, a new majority is come into place; or, in other words, a new generation. Each generation is as independent as the one preceding, as that was of all which had gone before. It has then, like them, a right to choose for itself the form of government it believes most pro-

motive of its own happiness; consequently, to accommodate to the circumstances in which it finds itself, that received from its predecessors; and it is for the peace and good of mankind, that a solemn opportunity of doing this every nineteen or twenty years, should be provided by the constitution; so that it may be handed on, with periodical repairs, from generation to generation, to the end of time, if anything human can so long endure.[14]

Jefferson wrote this in 1816. It would be wearisome reiteration to remind that, since his time, the circumstances of society have been transformed to an extent and with a pace beyond the most roaming vision of Jefferson's imagination.

While there is no demand for the general overhauling of the government, specific constitutional provisions are assailed as outworn. We are told that the Constitution obstructs the government's effective conduct of our foreign relations and disables it for meeting with competence certain of our domestic problems. The requirement of a two-thirds vote by the Senate for the ratification of treaties is assailed as a mischievous embarrassment upon desirable executive control of foreign affairs. Un-

doubtedly, there are treaties and treaties, and some international arrangements ought not to be subject to the stringent conditions of treaty-making. But the fundamental reason which led to the two-thirds requirement is still valid.

The makers of the Constitution were moved by the wise conviction that important international engagements should express not partisan or sectional views, but the substantial and considered feeling of the whole country. Differences in the outward forms of government sometimes conceal concordances in practice. Comparison is frequently made between the freedom of English cabinets in making treaties and the limitations imposed upon the President. The comparison is shallow. The British Constitution, to be sure, has no formal requirement for ratification of a treaty by Parliament. But certainly today no really far-reaching move in international affairs, no really important future commitment, is made by the British Government as a mere party measure or against the advice of the self-governing Dominions. At an acute stage of the London Naval Conference, Mr. MacDonald avoided Opposition threats because of the Government's reticence con-

cerning rumored commitments to France, by taking the leaders of the Opposition into the Government's confidence. Perhaps this informal method of consultation and collaboration so characteristic of the English constitutional system furnishes the clue for meeting our own difficulties. Through timely and adequate share by the Senate in the sources of knowledge about our international problems and responsibility in actual negotiations through Senate representation, there is ample room within the present framework of the Constitution for coöperation between President and Senate in the wise guidance of our foreign relations.

A change from a two-thirds to a majority vote for ratification would, at best, remove only some of the difficulties in the conduct of our foreign affairs and would create new ones. It is always easier to propose mechanical reforms than to explore the toilsome process of creating strong centers of informed and generous opinion regarding affairs, among the leaders of opinion upon whom the numerical public depends for its echoing views. No structural scheme will dispense with thoroughgoing and continuous education against provincialism and chauvinism in

popular opinion and its reflexes among Senators. More important than all the mechanical requirements of treaty-making is the opportunity afforded by the President's office for giving the country sustained and courageous leadership in foreign affairs.

The Constitution is also charged with hampering the Government's capacity to deal with certain domestic problems. According to the President of the United States, "The most malign" danger of our day "is disregard and disobedience of law."[15] Although we are still without dependable criminal statistics, there is little doubt that the incidence of crime in its cruder manifestations is far greater in the United States than in any other western country. Because of our volume of crime, there are men, particularly those charged with the administration of criminal justice, who are impatient of the restraints imposed upon officers of the law by some features of the Bill of Rights.

The Bill of Rights was written into the Constitution to guard against the recurrence of well-defined historic grievances. Provisions for trial by jury in criminal cases and against self-crimination and "unreasonable searches and

seizures," requirements for freedom of speech and freedom of assembly, summarized the experience of early American statesmen as to abuses of arbitrary power. Post-war hysteria and humorless fears have made people who ought to know better assume too naïvely that dangers from abuse of power passed with the eighteenth century. Others, like the late head of the New York police, do not know the experience of political history imbedded in the Bill of Rights, because history for them begins with their own experience. With jaunty ignorance, they seek to transfer to government the efficient methods of a department store. But decisions of the Supreme Court of the United States and of courts throughout the country serve as solemn reminders that police and prosecutors and even judges will, if allowed, employ brutality and yield to passion, with the same justification of doing so for the public weal as their predecessors relied upon for the brutalities of the seventeenth and eighteenth centuries. To urge, in the picturesque language of Police Commissioner Whalen, that for a criminal the Constitution is at the end of a police stick is, in

effect, to declare the community morally bankrupt.

We constantly and rightly point to England as a shining contrast to ourselves regarding crime and criminal justice. But we forget that the features in our Bill of Rights which are deemed hostile to government and favorable to those accused of crime are warp and woof of English law, imbedded, perhaps, even more securely in the texture of English feeling and conscience than they are secured by the written words of our own Constitution. With us the "third degree" is widely practiced and often condoned. In England the suggestion that Scotland Yard subjected Miss Savidge to the "third degree" gave rise to a whole day's debate in the House of Commons, provoked the condemnation of all parties, and led to the appointment of a Royal Commission on police methods.[16] Without the "third degree" and other forms of lawlessness by law officers, England has a low crime rate and maintains high standards in the administration of criminal justice.

In our impatience with the restrictions to which law officers are subjected in the use of

power, let us not forget that the history of liberty is to a large extent the history of procedural observances. I am aware of the abuses to which the jury system may be bent and the limited scope of the jury as a fact-finding instrument. But it is important to remember that the jury is the indispensable element in the popular vindication of the criminal law. I am the last person to minimize the deep shadows which the great volume of crime casts upon American civilization. But we gravely delude ourselves if we believe that these somber social phenomena will yield to mechanical tinkering with the machinery for criminal justice. That machinery does need improvement and readjustment. Our whole process of criminal justice is inadequate and inefficient, economically costly and morally cheap. But in many ways the center of gravity of our crime problems lies outside the courtroom; the real difficulties are unrelated to defects in trial procedure. The simple truth is that we have hardly begun to realize the need for establishing the means for acquiring understanding. As to the causes of crime, we know as yet next to nothing. All this preoccupation with the restrictions upon the criminal process due

to the privilege against self-crimination and the requirement of a unanimous verdict by a jury of twelve is largely a deflection of energy and attention. We are doomed to deep disappointment if we act on the belief that ancient experience in these matters is no longer relevant, and look for substantial diminution in crime by departing from the procedural wisdom of the Bill of Rights.

These dissatisfactions with the Constitution, such as they are, are all directed against some of its specific provisions and do not touch the general scheme of government. The essential distribution of power between the states and the national government as formulated nearly a century and a half ago is substantially unchallenged. How is one to account for the survival of the Constitution for a nation of less than four million scattered along the Atlantic seaboard, in our present empire stretched across the whole continent and beyond, in the Asiatic waters of the Pacific? The seeming puzzle is accentuated by the fact that the Constitution is not a dead document. It is, perhaps, the liveliest of our political traditions. It is in a true sense the organ of our political life. The

continuing serviceability of the Constitution during cycles of bewildering changes in the society which it governs must mean either that its forms have been adapted to wholly new uses, or that many political results are attained through accommodations outside of the constitutional structure, or that the Constitution within its own ample and flexible resources permits adequate response to changing social and economic needs.

In truth, all these three factors have combined to make the Constitution workable. In no single respect has the expectation of the framers of the Constitution been more completely frustrated by history than through the popular election of Presidents. Yet the forms of the Constitution have been retained and through them, in conjunction with the machinery devised by our political parties, are registered those very democratic forces against which the constitutional mechanism was directed.

Legal schemes often derive importance from what they do not formulate. Freedom for future needs is thus allowed. This is singularly true of the Constitution of the United States. While it established two sets of organs—the individual

states and the United States—only in a few matters did it explicitly define their respective authority. These two sets of government were bound to interact and it was the task of statesmen to make accommodations for their practical impingements. "Our system of government," in the language of Mr. Justice (now Mr. Chief Justice) Hughes "is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency."[17] Such a formula plainly implies a process of continuous adjustment and not the application of rigid rules of law.

But because formally there are two categories of lawmaking agencies, the state and the nation, the solution of our political problems through law has too often been conceived in terms of exclusive duality. Evils calling for legislative redress, recognized subjects of administrative control, governmental promotion of social ends, have throughout our history divided men into two hostile camps, those seeking relief through state action, and those appealing for national intervention. This assumes an untrue antithesis and confines political invention un-

duly. The combined legislative powers of Congress and of the several states permit a wide range of permutations and combinations for governmental action. Moreover, opportunities for educational influence are open to the federal government in matters outside of its legislative power. And state and federal governments may collaborate in the attainment of political ends where legislation would not be open to either.

Until recently, these potentialities for political activity outside of the express arrangements of the Constitution have been left largely unexplored. But Thomas Jefferson early saw that collaboration between the national government and the states need not be legal and formal; it might be educational and suggestive. In 1807, he thus wrote to a correspondent:

> Your opinion of the propriety & advantage of a more intimate correspondence between the executives of the several States, & that of the Union, as a central point, is precisely that which I have ever entertained; and on coming into office I felt the advantages which would result from that harmony. I had it even in contemplation, after the annual recommendation to Congress of those measures

called for by the times, which the Constitution had placed under their power to make communications in like manner to the executives of the States, as to any parts of them to which the legislatures might be alone competent. For many are the exercises of power reserved to the States, wherein an uniformity of proceeding would be advantageous to all. Such are quarantines, health laws, regulations of the press, banking institutions, training militia, &c., &c. But you know what was the state of the several governments when I came into office. That a great proportion of them were federal, & would have been delighted with such opportunities of proclaiming their contempt, & opposing republican men & measures. Opportunity so furnished & used by some of the State Governments would have produced an ill effect, & would have insured the failure of the object of uniform proceeding.[18]

Just a hundred years after Jefferson's letter, President Roosevelt initiated the Conference of Governors—a mode of mobilizing opinion for political action outside the scope of the federal government, which has since been followed by his successors. Mr. Hoover's recent White House Conference for Child Health and Protection is the latest example. Similarly in Australia, state and federal authorities have man-

aged to deal with some matters of common interest, particularly in the field of public health, by mutual agreement, and, like our meetings of governors, they have an annual Conference of State Premiers.

Our rapid industrialization has generated a variety of interactions in the affairs of the several states that not infrequently are beyond the exclusive legal powers of state or nation. These situations make it clear that the traditional alternatives of state or national intervention do not comprehend the legal resources open to statesmen in the solution of public problems. In other words, there are many channels for the accomplishment of political ends that are outside the Constitution but not forbidden by it.

The pressure of practical necessities has led in recent years to the exploration of new techniques and the devising of new machinery for the settlement of problems transcending state lines. Let me illustrate. Since 1890 the National Conference of Commissioners on Uniform State Laws has been promoting uniformity of state legislation on subjects beyond the power of Congress, although diversity of state laws makes for mischief. By this method a large

measure of the commercial transactions of the country are being brought under common legal control. The importance of a policy of common action is again reflected in the conscious practice of courts to base decision in these fields, as for instance in questions of marine insurance, on grounds of needed harmony between jurisdictions legally independent of each other. Again, reciprocal legislation is resorted to, whereby the legal power of one state to harm or to benefit another is exercised by creating immunities or handicaps conditioned upon like treatment by sister states. Thus, conflicting interests are adjusted and uniformities are achieved between different states in such matters as the regulation of auto traffic, the administration of tax laws, the enforcement of legal process. Conferences of governors and other state officials, sometimes initiated by, and with the collaboration of, federal authorities, have stimulated common state action and served as a clearing house of views on policies essential to an understanding of common interests. By auxiliary federal legislation, the states have been enabled to control more effectively matters predominantly the concern of state legislation.

Enactments affecting liquor before the prohibition amendment, and others affecting game and prison labor, illustrate a resource of federal legislation, complementing state action, which offers many opportunities for the future. Following the English device of grants-in-aid, the federal government has latterly stimulated state action through financial assistance in matters outside direct federal legislative power but involving interests common to the whole country. By this method, education, better public highways, and child welfare have been promoted. Another device is applied to the administration of public preserves, like the Palisades, falling outside the legal control of a single state. By means of joint sessions and joint action of legally distinct administrative state agencies, a practical fusion of control is achieved and legally separate parts of a common interest are dealt with as a unit. Finally the Transportation Act of 1920 initiated a practice of coöperation between state public service commissions and the Interstate Commerce Commission. State Commissioners now sit with Interstate Commerce Commissioners when the latter deal with issues of intimate local concern

that require the harmonizing of state and federal action.

These seven instances illustrate extra-constitutional forms of legal invention. They are devices not contained in the Constitution nor contemplated by it, but evolved through pressure of problems touching more than one state.

Two other modes of adjusting interstate issues have their sources in the Constitution. As the interests of states have transcended state boundaries, these provisions have been found increasingly useful. Through its jurisdiction over "Controversies between two or more States," the Supreme Court is building up a body of law for the settlement of interstate problems susceptible of judicial disposition. Thus, the Supreme Court has just composed the conflict between Chicago and Illinois on the one hand and states bordering on the Great Lakes, concerning diversion by Chicago of waters from Lake Michigan for purposes of sewage disposal. A provision of the Constitution even more fruitful authorizes a state with "the Consent of Congress" to "enter into an Agreement or Compact with another State." Availed of, hitherto, only on very restricted oc-

casions, the needs of our own days have revealed the rich potentialities of state compacts.[19]

Difficulties in the following fields of legislation have elicited resort to the Compact Clause: boundaries and sessions of territory, control and improvement of navigation, criminal justice, interstate accounting, conservation of natural resources, taxation, utility regulation. Thus the multiform problems of the port of New York—affecting the interests of New York, New Jersey, and the United States, and involving alert regulation of traffic on water, steady attention to the engineering needs of the harbor, adequate terminal facilities both on the New York and New Jersey side, effective means for loading and unloading, and speedy distribution—as a result of compact are now intrusted to the administration of the Port of New York Authority. Even more ambitious was the attempt to use compact for the adjustment of the bitter controversies among the states that border on the Colorado River. The Colorado River Compact attempted to formulate the terms of a policy for the present equitable apportionment of the waters of the Colorado River system, and also to provide machinery and

methods for continuous supervision and adaptations of policy to changing conditions. Six states have agreed to the compact, but Arizona has remained recalcitrant. In the meantime, the Colorado Compact has been made the basis of a partial solution of these intricate western water controversies by the adoption of the Boulder Dam project.

Most questions of interstate concern are beyond the jurisdiction of the Supreme Court; they are beyond all court relief. Legislation is the answer, and legislation must be coterminous with the region requiring control. We are dealing with regions, like the Southwest clustering about the Colorado River, or the states dependent upon the Delaware for water, which are organic units in the presence of a common human need like water. The regions are less than the nation and greater than any one state. The mechanism of legislation must therefore be greater than that at the disposal of a single state. National action is offered as a ready alternative. For a number of interstate situations, federal control is wholly outside the present scope of federal power, wholly unlikely to be conferred upon the federal government by

amendment, and in the practical tasks of government wholly unsuited to federal action even if constitutional power were obtained. There are building up in the United States regional interests, regional interdependencies, and even regional cultures. These produce regional problems calling for regional solutions. Control by the nation would be ill-conceived and intrusive. A gratuitous burden would be cast upon Congress and the national administration. These need to husband their energies and resources for the discharge of responsibilities that unequivocally belong to the nation and could not otherwise be assumed.

For merely regional interests, solutions should come from regional wisdom and pride. The regional economic areas demand continuity of administrative control in so far as control is to be exercised through law. The central problem of law, as every day makes more clear, is enforcement. Experience demonstrates that the demands of law upon economic enterprise, like the modern utilities, cannot be realized through the occasional explosion of a lawsuit, but call for the continuity of study, the slow building up of knowledge, the stimulation of experiments,

the initiative and enforcement that can be secured only through a permanent, professional administrative agency. Modern state legislatures must frequently grapple with problems whose stage is an interstate region, and by means of compact they may do so.

Thus we see that the Constitution provided for the future partly by not forecasting it, and partly by singularly shrewd devices that with time have become increasingly serviceable. But for continued vitality it was indispensable that the division of power between states and nation and the distribution of national power among the three departments of government, should in the main not be spelled out with particularity, but be derived from the general political conceptions regarding the purposes of the Constitution and their achievement. Thus, the Commerce Clause has been utilized as the great centralizing force in our constitutional scheme. But while the power to regulate commerce was given to Congress, since 1789 state legislation has also busied itself with interstate commerce. The states may to some extent regulate commerce among the states because they must—always with the power of Congress to gainsay through legisla-

tion and the power of the Supreme Court to annul through litigation. And so, for a hundred years we find exertions of state authority within the field of interstate commerce successfully passing the scrutiny of the Supreme Court. Practical necessities and shrewd judgments about practical matters decide the fate of state legislation when challenged by the power or the action of Congress. State necessities, the fitness of state relief as against nation-wide action, the limited manifestation of a given evil or the limited benefits of its correction, the actual interest of the whole country in a phenomenon especially virulent in a particular state, the advantage of local regulation balanced against the cost or inconvenience to interests outside the state—these and like questions are involved in the process by which the Supreme Court in concrete cases has held for or against state and national action in the interacting areas of state and national interests.

There have, of course, been narrow decisions, and recently with much frequency needless restrictions upon states and nation. "Petty judicial interpretations," wrote James Bradley

Thayer, one of the most profound students of our constitutional history, "have always been, are now, and will always be, a very serious danger to the country."[20] Such decisions involve a denial of John Marshall's greatest judicial utterance that "it is *a constitution* we are expounding."[21]

The framers of the Constitution intentionally bounded it with outlines not sharp and contemporary, but flexible and prophetic.

> The Constitution of the United States [I quote from a classic opinion by Mr. Justice Matthews], was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues.[22]

Hence, with the great men of the Supreme Court constitutional adjudication has always been statecraft. As a mere lawyer, Marshall had his superiors among his colleagues. His supremacy lay in his recognition of the practical needs of government. Those of his successors whose labors history has validated were men

who brought to their task insight into the problems of their generation. The great judges are those to whom the Constitution is not primarily a text for interpretation but the means of ordering the life of a progressive people.

The tradition of Marshall is best expressed for our days by Mr. Justice Holmes:

> Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.[23]

And again:

> . . . when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light

of our whole experience and not merely in that of what was said a hundred years ago.[24]

The flexible scope of the Constitution and the qualities of statesmanship demanded for its construction are illustrated by what is often alleged to be the greatest defect of the Constitution, namely, the doctrine of the separation of powers. That doctrine embodies cautions against tyranny in government through undue concentration of power. The environment of the Constitution, the debates at Philadelphia and in support of the adoption of the Constitution, unite in proof that "The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."[25] As a principle of statesmanship, the practical demands of government preclude its doctrinaire application. The latitude with which the doctrine must be observed in a work-a-day world was insisted upon by those shrewd men of the world who framed the Constitution.

In a word, we are dealing with what Madison called a "political maxim" and not a techni-

cal rule of law. On the whole, "separation of powers" has been treated by the Supreme Court not as a technical legal doctrine. Again barring some recent decisions, the Court has refused to draw abstract analytical lines of separation and has recognized necessary areas of interaction among the departments of government. Functions have been allowed to courts as to which Congress itself might have legislated; matters have been withdrawn from courts and vested in the executive; laws have been sustained which are contingent upon executive judgment on highly complicated facts. By these means Congress has been able to move with freedom in modern fields of legislation, with their great complexity and shifting facts, calling for technical knowledge and skill in administration. Enforcement of a rigid conception of separation of powers would make modern government impossible. The control of navigation, the regulation of railroad rates, the administration of the Pure Food and Drugs Act, the allocation of wave lengths, are all achieved by refusing to treat the doctrine of separation of powers as a sterile dogma. One aspect of this problem is raised by the desire to adjust the tariff to the

shifting forces of foreign trade. The President and Senate are in conflict in regard to the policy of a flexible tariff provision. The Senate wishes to reserve to Congress power to make drastic modification of the tariff; the President insists that modern economic conditions require that the means for making such modification be lodged in him. If Congress should choose to give this power to the President,* past decisions of the Supreme Court indicate that it may do so. Whether the President should have such power raises broader questions. The constitutionality of a policy does not determine its wisdom.

In simple truth, the difficulties that government encounters from law do not inhere in the Constitution. They are due to the judges who interpret it. For, in the language of the present Chief Justice spoken when he was Governor of New York, "we are under a Constitution, but the Constitution is what the judges say it is. . . ."[26] That document has ample resources for imaginative statesmanship, if judges have

* Since the above was written, Congress has enacted the Hawley-Smoot tariff bill, giving the President, upon recommendation by the Tariff Commission, power to revise upward or downward the rates as fixed in the statutory schedules.

imagination for statesmanship. When seen through the eyes of a Mr. Justice Holmes, there emerges from the Constitution the conception of a nation adequate to its national and international duties, consisting of federated states possessed of ample power for the diverse uses of a civilized people. He has been mindful of the Union for which he fought; he has been equally watchful to assure scope for the states upon which the Union rests. He has found the Constitution equal to the needs of a great nation at war, and adequate to the desires of a generous and daring people at peace.

III

Public Services and the Public

NO task more profoundly tests the capacity of our government, both in nation and state, than its share in securing for society those essential services which are furnished by public utilities. Our whole social structure presupposes satisfactions for which we are dependent upon private economic enterprise. To think of contemporary America without the intricate and pervasive systems which furnish light, heat, power, water, transportation, and communication, is to conjure up another world. The needs thus met are today as truly public services as the traditional governmental functions of police and justice. That both law and opinion differentiate from all other economic enterprise the economic undertakings which furnish these newer services is not the slightest paradox. The legal conception of "public utility" is merely the law's acknowledgment of "irreducible and stubborn facts."

The crux of the matter was put sixty years ago by Charles Francis Adams, the younger,

in one of his famous reports for the Massachusetts Board of Railroad Commissioners. He laid down this basic principle:

> All sums exacted from the community for transportation, whether of persons or of property, constitute an exaction in the nature of a tax,—just as much a tax as water rates, or the assessments on property, or the tariff duties on imports. . . . The reduction of this tax to the lowest possible amount paid for the greatest possible service rendered, always observing of course the precepts of good faith and the conditions of a sound railroad system, —this must be the great object the [railroad] commissioners retain always in view.[27]

Railroad regulation was the precursor of the far-flung system of utility control today, and what Charles Francis Adams said about the relation of transportation to the community applies with equal force to more recent utility services.

Indeed, the services rendered by what we now call public utilities have been under public supervision of some sort for a century. Regulation of railroad rates by the states began with railroad transportation. From the outset, the

special charters by which railroads were authorized prescribed maximum rates or, more frequently, permitted the railroads to fix their charges, subject to limitations upon the amount of net earnings. Provisions like these are found in New York legislation, for instance, as far back as 1828. There were also requirements as to facilities and services. But they were tenuous attempts at control and proved increasingly ineffective. So, legislatures began to experiment with early forms of continuous administrative oversight of railroads and, in the wheat regions, of grain elevators. Water and light companies, first gas and then electricity, largely restricted their services during this period to individual communities, and regulation by such localities sufficed. Gradually, the extension of the area of service by the utilities, the political influences they exerted, the technological advances, the feebleness of existing machinery and procedure for control, combined to make the movement for more effective regulation of public utilities perhaps the most significant political tendency at the turn of the century.

Congress had set the states an example in

the establishment of the Interstate Commerce Commission in 1887, and Roosevelt made vivid the need for government to counterbalance the powerful economic forces in whose keeping the public services then were. The incapacity of the existing system of regulation to cope with revealed abuses and the emergence of new forms of public services, like pipe lines and power, were texts employed by Roosevelt with constant reiteration. By arousing the country, he secured from Congress legislation which energized the enforcement of the Interstate Commerce Act and greatly extended its scope. Roosevelt was really in the tradition of the Granger Movement, which in the seventies began "to put teeth" into law for the control of railroads. To a considerable degree he expressed the midwestern emphasis in politics, of which men like the elder LaFollette of Wisconsin and Dolliver of Iowa had become the most conspicuous leaders. But by dramatizing these problems and utilizing to the full the prestige of the Presidency, Roosevelt gave impetus to the progressive forces within the states to control their utilities. The modern system of state utility regulation thus coincides with the efforts

of Roosevelt to arm the federal government with powers adequate to assure interstate public services.

The present systems of state utility regulation have been operative about a quarter of a century. Wisconsin led the way, quickly followed by New York. Urgent public needs prompted the legislation. Its rationale was public protection through governmental instrumentalities that should be capable of matching in power and in technical resources, the power and resources of the public utilities. The situation was put by Governor Hughes in his message to the New York Legislature of 1907, recommending the passage of a public-service commission law:

> Proper means for the regulation of the operations of railroad corporations should be supplied. For want of it, pernicious favoritism has been practised. Secret rebates have been allowed, and there have been unjust discriminations in rates and in furnishing facilities for transportation. Those who have sought to monopolize trade have thus been enabled to crush competition and to grow in wealth and power by crowding out their rivals who have been deprived of access to markets upon equal terms.

These abuses are not to be tolerated. Congress has legislated upon the subject with reference to interstate commerce, where naturally the evil has been most prominent. But domestic commerce must be regulated by the State, and the State should exercise its power to secure impartial treatment to shippers and the maintenance of reasonable rates. There is also need of regulation and strict supervision to ensure adequate service and due regard for the convenience and safety of the public. The most practicable way of attaining these ends is for the Legislature to confer proper power upon a subordinate administrative body.[28]

Prior to this legislation the two vital elements in the part played by utilities in the community's life were the dependence of the community upon the utilities, and the reliance upon the self-interest of private enterprise in vindicating this public trust. The new legislation was intended to create governmental instruments and processes through which sound relations between public utilities and the public could work themselves out. To that end, a nonpolitical administrative agency was established, presumably expert and disinterested and equipped with the necessary technical aid, charged with

securing to the public at reasonable cost services adequate according to modern technological standards and assuring to the utilities a fair income to make possible these services.

These measures encountered serious constitutional hurdles, as had the Interstate Commerce Act before them. The obstacles were narrow conceptions of the doctrines of separation of powers and of limitation upon legislatures in delegating their authority. So distinguished a lawyer as William M. Evarts, then Senator from New York, thought that the Interstate Commerce Act violated the Constitution. Similarly, Governor Hughes's efforts to fashion effective instruments of regulation were opposed by many of the leading lawyers. Happily, statesmanship triumphed both in legislation and adjudication. A few judges and an occasional court were imprisoned by their own dialectic. But the Supreme Court, and the state courts generally, found these constitutional doctrines adaptable to the new exigencies of government. They did not read the Constitution so as to forbid the creation of administrative devices merely because these exercised functions which, as a matter of logical analysis, partook of all

three forms of governmental power—legislative, executive, and judicial.

Though not wholly unknown to legal history, in their range and complexity these commissions constituted new political inventions responsive to the pressure of new economic and social facts.

> . . . there have been constant manifestations [said Mr. Justice Hughes in 1916] of a deepening conviction of the impotency of Legislatures with respect to some of the most important departments of law-making. Complaints must be heard, expert investigations conducted, complex situations deliberately and impartially analyzed, and legislative rules intelligently adapted to a myriad of instances falling within a general class. It was not difficult to frame legislation establishing a general standard, but to translate an accepted principle into regulations wisely adapted to particular cases required an experienced body sitting continuously and removed, so far as possible, from the blandishments and intrigues of politics. This administrative type is not essentially new in itself, but the extension of its use in State and Nation constitutes a new departure.[29]

The decade prior to our entry into the World War was the period of initiation of this new

political machinery, its adjustment to the traditional legal system, the improvisation of its own procedure, and the steady increase of the load which it had to carry. The commissions' ambit of authority was extended both by subjecting more classes of utilities to their control and by widening the sphere of oversight. The public interest in rates, services, accounting, finance, organization, with all the intricacies which these imply, was intrusted to the commissions. With characteristic American buoyancy we assumed that we had discovered a panacea, and so made it work overtime. We also assumed that it would work by itself.

Undoubtedly much was accomplished during this first period. The cruder corruption of earlier days was terminated, glaring practices of unfairness were corrected, the preoccupation with dividends which received its classic epitome in Commodore Vanderbilt's "the public be damned" had at last a counterpoise. Here seemed to be real achievement; solid proof that government could meet needs of society at once the most complicated and fundamental. Thus, when New York came to revise her Constitution, her leading men believed the experi-

ment of regulating utilities by commission had so vindicated itself that it should be withdrawn from the risks of politics and the hazards of legislative repeal. In the debate on this subject, the chairman of the convention, Senator Root, intervened, and some of his observations bear reminder:

> The method of exercising the jurisdiction of these commissions is still in the stage of development. But, I do not think we should lose the opportunity to put into the Constitution enough to make it impossible for any Legislature ever to abandon the system of regulating public service corporations through a commission or commissions whose business it is to deal with the subject, and to go back to the old method of leaving public service corporations unregulated, except by the passage of laws in the Legislature. The public service commissions, both in this State and in other States, and in the nation, were created to meet and deal with very great and real evils. In this State before we had that system, if a man was unjustly treated by a railroad, he had no recourse, except a lawsuit that was beyond his means, or a complaint to his representative in the Legislature. A lawsuit by a single individual of moderate means against one of these great corporations was hopeless. . . . The duty of holding these

corporations accountable was a burden upon the Legislature which it ought not to have been called upon to perform. But, worse than that, this multitude of bills, founded upon just complaint, brought after them a multitude of strike bills introduced for the purpose of holding up the corporations, holding them up and calling them down. Many of us can now remember the dreadful days of the Black Horse Cavalry which came as an incident mainly, to the performance of this duty by the Legislature, and, further still, the fact that . . . the great public service corporations were being attacked in the Legislature, justified them in their own minds in going into politics and electing, or furnishing money to elect, members of the Senate and Assembly. . . . The whole system became a scandal and a disgrace, and it was to remedy that here in New York and all over the country that this system of regulation by a commission created by law was established. The results have been most beneficent. No greater reform has been wrought in the public life of our country than has been wrought by the transfer of this attempt to regulate these great corporations from the legislative bodies of the country to public service commissions.[30]

The system thus lauded by Senator Root in 1915 is now, with an exception or two, part of

the governmental machinery of every state. Concerning its efficacy, however, pessimism has supplanted the earlier feeling of hope. No doubt this change of temper is partly a reflex of the different price levels before and after the war. When the commissions began, rates were widely believed to be unreasonable. To secure their reduction was one of the chief motives for the establishment of commissions. For the pre-war period, this hope was in large measure realized. But even during the war, street railways found themselves in difficulty, and the great rise in prices following the war made the commissions become instruments for the increase of utility rates rather than their decrease. In the aspect most immediate and obvious to the public, the utilities and not the public appeared to be the beneficiaries of utility regulation. This was, of course, a very shallow view, and disregarded all the complexities of inflation, gold reserves, and war dislocations behind price movements. The general public did not fathom these complexities. It did know that it was paying more for street-car rides and telephone calls, for gas and electricity. Since the public service commissions ordered these increases, earlier

public support of them turned into skepticism and distrust.

But this only partly accounts for a growing discontent with the working of the system during the last decade. Throughout the United States, the machinery of utility regulation has shown strain. Conviction has been gathering that not only have the aims for which the commissions were designed not been realized, but that the regulatory systems operate to defeat the very purposes for which they were created.

Particularly in the leading industrial states, criticism has been voiced against the failure of utility rates to reflect decreased operating costs due to technological improvements; against the costly futility of rate proceedings which distort the protection intended by law; against failure to exercise skilled initiative in the promotion of the public interest. And all the time the power of the utilities has been increased through versatility in devising intercorporate relations. Partly through devices not subject to law and partly through the ineffectiveness of law in actual administration, the impotence of the individual is increased and the mastery of law over these enterprises is eluded.

That the public grievances are widespread and deep-rooted, the demands for inquiry into the workings of the existing machinery for regulation bear ample testimony. In New York, the Commission, charged with the duty of "ascertaining whether the public service commission law . . . accomplishes the objects for which the system of state regulation was established," has recently submitted comprehensive reports to the Legislature. The three Commissioners appointed by Governor Roosevelt to represent the general public thus state their basic finding:

> Evidence presented before the Commission on Revision of the Public Service Commissions Law shows that the State of New York is faced with a crisis. Effective regulation along the lines originally intended by the act has broken down and the consumer has been left to the exploitation of the monopolistic private companies which control the public services. Unless effective regulation can be restored, there is bound to be a rapid shift of public opinion in favor of public ownership and operation.[31]

Informed opinion is in substantial agreement that the present system is not adequate for the old evils which brought it into being, and is incapable of coping with new problems of

greater subtlety and deeper concern to society. In the diagnosis of this situation, there is also common ground among students of utility regulation.

The difficulties will perhaps appear more clearly by analysis of a concrete situation. The New York Telephone case will serve as an illuminating sample of utility regulation in action.

In the winter of 1919, the New York Telephone Company filed with the Public Service Commission for the Second District of New York (the Commission having jurisdiction of telephone rates within the state) more than two hundred separate schedules of rates, nearly all of which included increases in existing rates. Almost every municipality in the state questioned the propriety of such increases, and a hundred and thirty-five separate complaints against such rates were filed. The Commission entered upon hearings in two of these proceedings, one relating to Buffalo, the other to Syracuse.

While these hearings were in process, the Public Service Commissions Law of New York was amended, the Second District Commission abolished, and a single state-wide commission

created, which took office April 25, 1921. The new Commission heard argument in the pending Buffalo and Syracuse proceedings and made orders permitting the increased rates in Syracuse, but directing decreased rates in Buffalo.

On its own motion, the Commission combined all pending complaints, including a complaint made by the City of New York against new rates filed by the Telephone Company in August, 1920, for that city.

Hearings conducted on a state-wide basis were begun. After about six months the Commission ordered certain temporary decreases in New York City and in some up-state exchange areas. Claiming the valuation upon which these decreases were based to be confiscatory, the Telephone Company promptly appealed to the federal court, which, on June 12, 1922, enjoined the Commission's order.

On January 25, 1923, the Commission completed its state-wide investigation of rates and made its order. This order was effective as of March 1, 1923, and included the decreased Buffalo rates and increased Syracuse rates as fixed in the former orders, but made new groupings of exchange areas throughout the state and

fixed a schedule of rates which included both increases and decreases in existing rates.

The Company put these rates in effect throughout the state.

About a year later, on January 23, 1924, the Company applied to the Commission for permanent increases, claiming that the rates fixed by the Commission in 1923 had proved inadequate. It also asked for an immediate temporary increase. This the Commission denied.

On April 26, 1924, the Company again appealed to the federal court, and on May 1, 1924, the court allowed the Company a ten per cent surcharge on New York City rates, leaving for the time the rates elsewhere in the state as fixed by the Commission.

On September 2, 1924, the court appointed a Special Master to consider the issue of confiscation. This involved elaborate "valuation" of the properties of the Company by which it rendered its public service. Hearings before the Master began on October 14, 1924, and continued until September 10, 1928.

On December 24, 1925, and while these hearings were pending before the Master, the Company made a second application to the federal

court to modify the terms of the preliminary injunction so as to permit a greater surcharge in New York City and to impose a surcharge in the rest of the state. This motion the federal court denied on March 10, 1926.

In the meantime, the Public Service Commission continued its hearings on the application for permanent increases filed by the Company on January 23, 1924. These proceedings before the Commission were concluded on May 26, 1926, when the Commission made an order permitting increases in the City of New York of about $11,000,000, but denying increases upstate. Two of the Commissioners voted for larger increases.

On August 10, 1926, the Company took this order to the federal court, and the court referred the 1926 rates to the Master who was then hearing the case arising out of the 1923 rates.

On March 12, 1929, the Master reported to the court that the orders of the Commission both for the 1923 and 1926 rates were confiscatory. He supported, in substance, the Company's claims. He valued the Company's property at $518,109,584, and thereon allowed an income at the rate of 8 per cent. This would have

netted the Company a return of $41,448,777 and have added about $20,000,000 to the annual telephone bill of New York.

On November 11, 1929, the federal court made its determination. Certain corrections were thereafter made, and on December 27, 1929, the final decree was filed. The decree of the court found both rate orders of the Commission (1923 and 1926) confiscatory, but on a number of important issues, namely, rate of return, going value, and deduction of depreciation reserve, agreed with the Public Service Commission. It therefore reduced the valuation of its Master to $397,207,925, and cut the Master's proposed rate from 8 to 7 per cent giving a return of $27,804,555.

On January 21, 1930, purporting to act on the court's decision, the Company announced new rate schedules, having added $133,000,000 to the valuation fixed by the court in order to adjust the "value" as of June 30, 1930.

On January 28, 1930, the Public Service Commission held hearings on the Company's new rate schedules and on January 31, 1930, the Commission announced temporary rate schedules involving some reduction of the

Company's new rates, pending hearings before the Commission with a view to fixing permanent rate schedules in conformity with the court's order.

On May 1, 1930, the Commission fixed such rates, making cuts in some rates and increases in others. The Company has announced that it will comply with the Commission's order "under protest."[32]

There the matter rests, but only for the immediate present. Further appeal to the courts in the future is left open by the Company's announcement that "no further application to the courts is contemplated at this time." Thus, one need be no pessimist to anticipate that the rate determination arrived at by the Commission is likely to give rise to another litigation, while the old one is now on its way to the Supreme Court of the United States.

Down to the Special Master's report of last year, the record of this controversy contains 62,864 pages of testimony, and the number of exhibits filed is 4,323—making a shelf of books about ten times as long as President Eliot's famous library! The Company alone has spent $5,000,000 in the fight, but the more significant

cost is the bitter feeling which the controversy has engendered between the Telephone Company and the public. And after ten years of regulation, New York and its Telephone Company are still in the throes of conflict over what the public may fairly be asked to pay for its telephone service and what the Company is fairly entitled to earn for rendering it.

The heart of the difficulty is the current judicial approach to utility valuation. Out of the constitutional provision safeguarding property against deprivation "without due process of law," the Supreme Court has evolved a doctrine that a utility is entitled to a fair return on its present "value," and "value" must be ascertained by giving weight, among other things, to estimates of what it would cost to reproduce the property at the time of the rate hearing. The Supreme Court has not given us a calculus of present value, and it has left in conscious obscurity the amount of weight to be given reproduction cost. Some of its language has, however, induced commissions and lower courts to find that controlling effect should be given to such cost.

The doctrine was originally urged upon the

Supreme Court by William Jennings Bryan, on behalf of agricultural communities, after the depression following the panic of 1893 as a protection against inflated claims based on what were then deemed inflated prices of the past, and in order to justify reduction of railroad rates. It is a matter of history that

> insistence upon reproduction cost was the shippers' protest against burdens believed to have resulted from watered stocks, reckless financing, and unconscionable construction contracts. Those were the days before state legislation prohibited the issue of public utility securities without authorization from state officials; before accounting was prescribed and supervised; when outstanding bonds and stocks were hardly an indication of the amount of capital embarked in the enterprise; when depreciation accounts were unknown; and when book values, or property accounts, furnished no trustworthy evidence either of cost or of real value. Estimates of reproduction cost were then offered, largely as a means, either of supplying lacks in the proof of actual cost and investment, or of testing the credibility of evidence adduced, or of showing that the cost of installation had been wasteful.[33]

What thus served as an empiric device for pre-

venting swollen returns on fictitious values, has in the course of time, but particularly during the last few years, been turned into the most luxuriant means for creating fictitious values. And for this economic legerdemain, constitutional sanction has been sought.

Yet the minimum supposedly fixed by the Constitution is far higher than the earnings of utilities during a period of greatest prosperity. As a matter of "good business judgment," utilities have charged rates which would be confiscatory under the doctrine of a reasonable return on "present value." But these lower rates have been adequate to attract needed new capital and pay good dividends on the common stock.

The determination of utility rates and the ascertainment of the rate base are essentially economic problems. But no judicial pronouncements upon matters fundamentally economic run so counter to the views of economists as do the more recent utterances of the Supreme Court upon present value. They are based upon unrealities, are financially unsound, and lead to uncertainty and speculation. The so-called rules set the regulating agencies an impossible

task, for they form a maze of cobwebbery. The method of valuing the property of a utility by estimates of the cost of reproducing "the congeries of old machinery and equipment called the plant, and the still more fanciful estimates concerning the value of the intangible elements of an established business"[34] is bound to discredit any system charged with its administration. For this method of determining value, in the language of the Michigan Commission,

> . . . usually included percentages for engineering services never rendered, hypothetical efficiency of unknown labor, conjectural depreciation, opinion as to the condition of property, the supposed action of the elements; and, of course, its correctness depends upon whether superintendence was or would be wise or foolish; the investment improvident or frugal. It is based upon prophecy instead of reality, and depends so much upon half truths that it bears only a remote resemblance to fact, and rises at best, only to the plane of a dignified guess.[35]

The New York Telephone case proves conclusively why the prevalent Supreme Court doctrine does not work; it also proves why, in the vernacular, it is being "worked." The range of "values" in this case reveals that the doctrine

of present value is totally devoid of elements for objective tests. For the same property as of the same date, July 1, 1926, there were six different estimates of the fair "value" and fair "return" of the New York Telephone Company for rate-making purposes:

ESTIMATES OF FAIR PROFITS FOR NEW YORK TELEPHONE COMPANY

(on intrastate business as of July 1, 1926)[36]

	Fair Value	*Rate*	*Fair Return*
Majority of Public Service Commission	$366,915,493	7%	$25,635,000
Federal Court	397,207,925	7%	27,804,555
Minority of Public Service Commission	405,502,993	8%	32,480,000
Special Master's Report	518,109,584	8%	41,448,777
Company claim based on Whittemore appraisal	528,753,738	8%	42,300,299
Company claim based on Stone & Webster	615,000,000	8%	49,200,000

The estimates of value thus ranged from $366,915,493 to $615,000,000, with a corresponding spread in the return thereon from $25,635,000 to $49,200,000. Between the two valuation estimates by the Company's own experts there was a disparity of more than $86,000,000. Yet all these estimates purported to be based on the requirements of Supreme Court decisions, and at the end of ten years the final

guess remains in doubt! Moreover, much new capital has been added since the date of these estimates, new problems of depreciation have arisen, and, indeed, the whole process of valuing the property now in use, must, according to the theory of present value, start all over again.

Undoubtedly, the stakes are high for those who control utilities through very narrow equities, offering great opportunity for speculative gain. But to conservative utility managers and investors in bonds and preferred stocks, the present scheme of utility valuation must be as unsatisfactory as it is to utility commissions. For it is based fundamentally upon untruths.

But perhaps the social costs are the severest, poisoning as they do the relations between the utilities and the public, and undermining the confidence of the community in the effective capacity of government. This phase of the matter has been put impressively by Mr. Justice Brandeis:

> The most serious vice of the present rule for fixing the rate base is not the existing uncertainty; but that the method does not lead to certainty. Under it, the value for rate-making purposes must ever be an unstable factor. Instability is a standing menace

of renewed controversy. The direct expense to the utility of maintaining an army of experts and of counsel is appalling. The indirect cost is far greater. The attention of officials high and low is, necessarily, diverted from the constructive tasks of efficient operation and of development. The public relations of the utility to the community are apt to become more and more strained. And a victory for the utility, may in the end, prove more disastrous than defeat would have been. The community defeated, but unconvinced, remembers; and may refuse aid when the company has occasion later to require its consent or coöperation in the conduct and development of its enterprise. Controversy with utilities is obviously injurious also to the public interest. The prime needs of the community are that facilities be ample and that rates be as low and as stable as possible. The community can get cheap service from private companies, only through cheap capital. It can get efficient service, only if managers of the utility are free to devote themselves to problems of operation and of development. It can get ample service through private companies, only if investors may be assured of receiving continuously a fair return upon the investment.[37]

The doctrines of fanciful valuation have greatly encouraged recent tendencies in finan-

cial organization. In turn, the elaborate and mysterious refinements of intercorporate relations have powerfully sustained the efforts by which lawyers and engineers have built up schemes for inflated values. The search for fictitious value—at best a game of blind man's buff—is thus greatly complicated by the intricacies of elaborate corporate arrangements within utility enterprises. Not only is there the excitement of a game fascinating to technicians in law and engineering, but in applying the prevalent judicial doctrines of utility valuation by manipulating intercorporate relations, there are the cruder but more solid temptations of buttressing unreasonable rates by law and securing huge profits through speculative utility holdings.

The characteristic of present-day utilities is the interrelation of the various systems. Recently Massachusetts and New York Commissions reported to their Legislatures that the basic utilities in their states were controlled by a few great systems, themselves affiliated and tending toward monopoly. These developments are, of course, justified by claims of economic advantage and because they are types of or-

ganization required by technological advances. But other influences are also at work, and these have created social problems and governmental difficulties not at all foreseen by the architects of the present system of utility regulation.

In the consolidation of utilities extremely high prices are paid for the stock of the acquired companies, with consequent pressure for rates high enough to permit profit on the investment. Because of bankers' control of utilities, their policies are largely determined not by utility managers nor with reference to their public obligations. Bankers who finance utilities, naturally enough, look upon them like other investments. "The danger of domination of the [utility] systems by large scale financing is very apparent," reports the Massachusetts Commission, "and the great importance of the investment banking houses must be recognized." Moreover, these systems have organized auxiliary companies for management, construction, purchase and finance for supplying services through affiliated operating companies. "Large profits," I again quote from the Massachusetts report, "have been made from contracts for such services made between parties under the

same control, and so without any equality of bargaining power."[38] All these unreasonable profits are included in the operating expenses for which the public pays.

Here, then, are major aspects of the public services either wholly beyond the sphere of utility regulation or outside its competence. For the holding companies, which serve merely as a financial mechanism for controlling operating companies, are practically immune from law and certainly no state exercises an effective grip upon them. Indeed, attention has recently been called by the Interstate Commerce Commission to the danger of circumvention of the Interstate Commerce Act by means of holding companies. The national policies regarding railroad consolidation, the restriction of railroads to the railroad business and the promotion of efficiency through absence of conflicting interests, are now threatened by the subtle intrusion into the railroad situation of financial arrangements through holding companies, investment trusts and like devices. Equally beyond the scope of the existing regulatory system are the schemes for draining off "profits surreptitiously in various indirect ways" through adjustment of claims

for management, construction, purchasing, and financing among different units within a single system. Such transactions are either outside the bounds of present-day utility regulation, or they so complicate the situation as to evade the reach of the administrative authorities. So, arrangements between the American Telephone and Telegraph Company and the separate operating companies of the Bell System raise intricacies of finance and accounting that call for the highest skill and pertinacity in exploration. In practical result, they may involve differences of many millions in the burdens of the community or the gains of investors; and even more important, perhaps, are the consequences of controversies about such stakes, under existing legal conditions, to the public relations of utilities. In such a conflict Chicago and its Telephone Company have been embroiled for seven years, and the litigation still awaits final determination.

But the growing utility concentration raises a problem perhaps even more fundamental. The community's interests, as well as the satisfaction of incentives to private enterprise to furnish services for the community, assume civilized

standards of fair dealing. It is most difficult to translate these generalities into concrete policies in matters so technical and complicated as those involved in the management and regulation of public utilities. Government, to be effective, must have ample knowledge. That implies capacity on the part of its administrators to attain and use knowledge. But even this is not enough. We must have conditions under which truth and knowledge may flourish and function. Knowledge must be freed from the operation of inhibiting forces, whether those forces operate through pressure exercised crudely or through atmospheric influence. In order to be free, men must feel free to act. Therefore, to secure just dealings with public utilities, it is essential that the community conditions be such that those representing the public are not consciously or unconsciously warped in judgment or enfeebled in will.

In view of the intrinsic difficulty of its problems, the technical developments, the recent tendencies in organization, the vast and subtle interests to be composed, utility regulation at its best calls for fresh energy and newer resources to cope with the new and greater tasks

that now confront it. But the administration of public service laws is nowhere "at its best," and almost everywhere it is meager and ineffective. Even if it were not caught in the quicksands of the judicial doctrines of valuation, the whole scheme of utility regulation presupposes men of capacity and prestige, of courage and discernment, to match the powerful resources of the utilities. Instead, as a matter of blunt truth, there is inequality in *expertise,* in will, in energy, in imagination, between the utilities and government.

The men intrusted with the task have almost everywhere been overburdened by details, inadequately staffed, denied necessary technical aid, subjected to short tenures, dependent on meager salaries, and generally restricted to appropriations which produce humdrum routine. But some of the important states have escaped the folly of short tenure and niggardliness of compensation. Thus, New York wisely avoided popular election of Public Service Commissioners, provided for their appointment by the Governor for a term of ten years, and gave a salary of fifteen thousand dollars. Positions of dignity and prestige were created, which were to attract

such men as are drawn to the important posts in the British Civil Service, by the exhilaration of steering the state through some of the most treacherous and uncharted reefs and shoals of politics. But in New York especially all this hopeful planning went awry. Valuation litigation has largely absorbed the energies of administrators; and, as we have seen, to no good purpose. Of course, there have been exceptions and, without being invidious, one thinks of such men as the late John M. Eshleman, the first President of the California Railroad Commission; Judge George W. Anderson and Interstate Commerce Commissioner Joseph B. Eastman, both of whom served on the Massachusetts Commission; Milo R. Maltbie, formerly of the Public Service Commission of New York and recently called to be its chairman. But, in the main, the public as well as the utilities have suffered from too many mediocre lawyers appointed for political considerations, looking to the public service commissions not as means for solving difficult problems of government, but as opportunities for political advancement or more profitable future association with the utilities.

Except for occasional men of great capacity and exceptional devotion to the public interest, the technical staffs of the commissions, their engineers and accountants, are also no match for the experts against whom they are pitted. Indeed, the extent to which engineering talent is concentrated on the side of the utilities in these profoundly important public matters, is one of the most ominous features of the situation. As a result, the community is not represented by skill, enterprise, determination, and persuasiveness. And when the public and its utilities are in conflict before the courts, there is disparity of resources in the contest.

The sharpest emergence of these problems is due to the widespread development of electric power. Technology, an hazardous coal supply, the growing burden of transportation costs, the resulting stimulation of new forms of cheaper power, the pressure of the World War in accelerating this movement, have all combined to make the "electrical age" an apt characterization of our time. The primitive beginnings of this era lie less than forty years behind us. But probably no influence of applied science has had such pervasive economic and social con-

sequences in so short a time. From small independent plants generating electricity for a limited local market, the art first developed the stage of interconnection, then the further advances of giant power whereby a vast network of generating plants, transmission lines and distributing stations, heretofore independent in their operations, are combined into a unified system.

Such an integrated system, it has been urged, will make for great social gains by cheapening power, minimizing waste, and checking urbanized congestion by a wide diffusion of industry. That the concentration of the electrical industry is also fraught with grave public dangers is amply attested by the disclosures before the Federal Trade Commission, the reports of the New York and Massachusetts Commissions, the debates over water power at Muscle Shoals and Boulder Dam, and on the St. Lawrence. Every student of social economics recognizes the baffling problems raised by modern large-scale industry. The familiar difficulties would arise in intensified form, should monopolized control determine the country's growing dependence on power.

President Roosevelt gave early warning of these dangers. He thus put the matter in a message to Congress:

The people of the country are threatened by a monopoly far more powerful, because in far closer touch with their domestic and industrial life, than anything known to our experience. A single generation will see the exhaustion of our natural resources of oil and gas and such a rise in the price of coal as will make the price of electrically transmitted water power a controlling factor in transportation, in manufacturing, and in household lighting and heating. Our water power alone, if fully developed and wisely used, is probably sufficient for our present transportation, industrial, municipal, and domestic needs. Most of it is undeveloped and is still in national or state control.

To give away, without conditions, this, one of the greatest of our resources, would be an act of folly. If we are guilty of it, our children will be forced to pay an annual return upon a capitalization based upon the highest prices which "the traffic will bear." They will find themselves face to face with powerful interests intrenched behind the doctrine of "vested rights" and strengthened by every defense which money can buy and the ingenuity of able corporation lawyers can devise. Long before

that time they may and very probably will have become a consolidated interest, controlled from the great financial centers, dictating the terms upon which the citizen can conduct his business or earn his livelihood, and not amenable to the wholesome check of local opinion. . . .

The great corporations are acting with foresight, singleness of purpose, and vigor to control the water powers of the country. They pay no attention to state boundaries and are not interested in the constitutional law affecting navigable streams except as it affords what has been aptly called a "twilight zone," where they may find a convenient refuge from any regulation whatever by the public, whether through the national or the state governments.[39]

Roosevelt therefore insisted upon alert safeguarding of the public interest in the development of water power on navigable streams by full utilization of the authority of the federal government to that end. Not until 1920, however, did Congress formulate a comprehensive measure of protection in the disposal of these enormously valuable sources of power. But at the end of a decade, the Federal Power Commission, which was the agency for the enforce-

ment of the law, manifests the same defects in administration as have been noted in the state public service commissions. The Commission has spent itself in the same wasteful controversies about valuation, and has been devoid of the driving force necessary for great enterprise. The members of that Commission, to be sure, are men of prestige and ability. For the Secretaries of War, Interior, and Agriculture *ex officio* constitute the Commission. But that very fact is one of the chief sources of the Commission's failure. The responsibility for the water power policies of the United States and the protection of the power resources of the country cannot be left to the casual attention of three members of the Cabinet, whose own departmental duties are sufficient to absorb the time and talents of the most gifted Secretaries. The work of the Federal Power Commission has therefore fallen into the hands of subordinates, some of whom have shown unusual public zeal and discernment. But a few subordinates, subjected to great temptations and with appropriations from Congress so meager as to starve their efforts, are hardly equipped to meet complacency and legalism within the Commis-

sion and the pressure of acute and powerful forces without.*

If this picture appears gloomy, I can only plead a rigorous attempt to be faithful to the scene. Nor am I a dealer in panaceas, believing deeply that reflection upon governmental inadequacies and concern for their improvement furnish the most potent stimulus for devising reforms. Once the social implications of these public services are grasped and the failures of utility regulation are traced to their sources, there will not be lacking power and intelligence, if there be will, to translate the public interest into public administration.

A few postulates may, however, be ventured. Public regulation must extricate itself from the present doctrines of judicial valuation. Some such fixed rate base as has recently been proposed by the Interstate Commerce Commission and by Governor Roosevelt's representatives on the New York Commission, is necessary in the interest of the public as well as that of far-

* Since the above was written, Congress has amended the Federal Power Act so as to provide for a full-time instead of an *ex officio* commission. The effectiveness of the new commission will depend upon the quality of the President's appointees and the adequacy of appropriations by Congress.

sighted investors. Mr. Owen D. Young's desire "to see a rate base fixed on the actual investment and not on reproductive value,"[40] may eventually commend itself to other utility leaders. The drop in the price of commodities far below the prices on which utility developments have been made since 1920, may lead the utilities to realize that a return on prudent investment is their own best safeguard. And the Supreme Court, one believes, will find the Constitution no bar to economic wisdom and the demands of stability and fair dealing. In any event, the state should not subject water power and other utility resources still within public control to the dangers of current theories of judicial valuation. And municipalities must be given sufficient power to enable them to supply public services where private enterprise fails in its public obligations.

Again, local administration should be charged with responsibility for such matters of essentially local concern as the regulation of local public utilities. The present enfeeblement of utility administration by the states is in no small measure due to interference in administration by the lower federal courts. Gratuitous hostility

to the federal courts has thereby been aroused. These utility controversies turn largely on complicated state legislation, on local arrangements and local contracts peculiarly within the competence of the local tribunals. Deep reasons of regard for state action on policies peculiarly within state control support Senator Wagner's proposal that judicial review of state utility regulation should be restricted to the state courts, leaving the protection of rights under the federal Constitution to the ample reviewing power of the Supreme Court.

Finally, the public service commissions must be made adequate instruments for expressing the social policies that should guide the relations between utilities and the public. The complex problems of regulation call for a governmental agency qualified by experience, fortified by technical assistance, free from the pulls and pressures of politics, generating an esteem in the public such as the public now entertains for the judiciary, a public esteem which in its turn will arouse in these officials enterprise, courage, and devotion to the public good.

IV

Expert Administration and Democracy

EPITAPHS for democracy are the fashion of the day. Both left and right acclaim its failure. Those who chafe at governmental intervention distrust popular institutions as much as the romantics, who expect from government heaven upon earth. Dictatorships are dramatic and *coups d'état* feed the imagination, whereas democratic *régimes* have about them the humdrum qualities of John Bull, who, first in the modern world, devised talk as the chief instrument of government. Sensational and violent rule in Russia and Italy throws out of perspective more plodding popular institutions. But it is simply not true that the area of democratic government has contracted. Barring Italy, no country has abandoned democratic institutions, whereas democratic government has extensively replaced oligarchy, and the democratic idea is steadily corroding ancient autocratic traditions. The replacement of Romanoffs by Bolsheviks was cer-

tainly not a democratic loss. Nor did the short-lived Spanish dictatorship supplant a virile democracy. For the democrat, only Fascist Italy is a retrogression. But, on the other hand, a stable German Republic has displaced the Germany of the Kaiser. In succession to the feudalism of the Habsburgs, Hungary and Jugo-Slavia have reigns at least not more autocratic than they were in pre-war days, while Czecho-Slovakia has the heartening rule of President Masaryk, and Austria is a stout though poverty-stricken little republic. The ferment of democracy is active in modern Turkey, and is leavening the ancient fabrics of India and China with hope and danger. Nor should the most summary account of recent democratic trends omit the steady invigoration of the mentality as well as the processes of democracy in Latin-American countries, particularly Mexico.

The ultimate justification for democracy still remains the lack, in the long run, of a decent and workable substitute. The case for democracy has just been vindicated by General Smuts, the philosopher-statesman, in the full perspective of recent history and his great experience in war and peace:

The end of government is not merely good government, but the education of the people in good government, its self-education in running its own affairs. . . . The short cuts do not really bring us much farther, except to the next turn of the wheel of revolution. Liberty as a form of political government is a difficult experiment, and it is not without its dangers. . . . But it is at any rate less dangerous than its alternatives, and under modern conditions it is probably the only political system that promises to endure. The consent of the governed is the only secure and lasting basis of government, and liberty is the condition of consent. Only free men can consent to their form of government. Where there is no freedom and no consent, there must be a basis of force; the one or the minority in control can keep the majority in check only by means of force or domination, which is utterly repugnant to the new tendencies which are shaping political developments to-day. Bolshevism and Fascism, which are the current alternatives to democratic liberty, may be defended as a way out of intolerable situations, but they are temporary expedients, often tried and discarded before, and they will be discarded again after the present trials. The only political philosophy which holds the field is that which recognizes the fundamental ideals of human life in human government, and of these the greatest is liberty. No

enduring system can be established on the negation of liberty, even if it comes with the temporary gift of good government.[41]

This is a firm expression of allegiance to democracy, but one misses the lyric note which characterized the democratic faith a hundred years ago. The tasks and conditions that confront democracy leave no true friend without concern. Oversimplification is a great deceiver of reason, and nineteenth-century democracy suffered from the illusions of simplicity.

This early democratic faith was sustained by a gracious and civilized conception of society. But the difficulties in the way of its attainment were grossly undervalued. The tenacity of old habits, the fragility of human material, the conflicting forces within the individual no less than the clash of interests within society—all these and more were much too lightly weighed. The appeal of a generous society subordinated the question of means by which it was to be attained. Vast hopes were founded on simple devices. Popular rule was expected to work miracles almost automatically. Abolish autocratic rule, remove tyranny, and the innate goodness

of mankind will prevail! It was indeed largely a negative faith.

The day of such comfortable thoughts is over. Their shallowness, the war and its aftermath have too pitilessly exposed. We now realize that democracy is not remotely an automatic device for good government nor even for a peaceful society. We now know that it is dependent on knowledge and wisdom beyond all other forms of government. The grandeur of its aims is matched by the difficulties of their achievement. For democracy is the reign of reason on the most extensive scale. It seeks to prevail when the complexities of life make a demand upon knowledge and understanding never made before, and when the forces inimical to the play of reason have power and subtlety unknown in the past. We have seen the intricate range of problems thrown up by our industrial civilization; the vast body of technical knowledge, more and more beyond the comprehension even of the cultivated, which is required for an analysis of the issues underlying these problems and an exploration of possible remedies. We have also noted the opportunities for arousing passions, confusing judgment, and regimenting

opinion, that are furnished by chain newspapers, cheap magazines, the movies, and radio. And we now know how slender a reed is reason—how recent its emergence in men, how deep the countervailing instincts and passions, how treacherous the whole rational process. Moreover, the whole tempo of our society is hurried; its atmosphere and appurtenances hostile to reflection. Thus reason is asked to flourish when the conditions for it are least favorable.

Little wonder that for many, democracy seems ripe for the museum of political institutions. They assess its results as bankruptcy and find its inherent difficulties fatal. The naïve champions of democracy at least built on hope; these latter-day assailants are moved by fear. Both present foes and early friends disregard time and history. The apostles of democracy expected quick results. Those who despair of democracy also lack patience. The former thought they were writing on a clean slate; they forgot the obduracy of the past. Those who concentrate on the defects of democracy are blind to what history discloses of the weaknesses of alternative forms of government.

The answer to the defects of democracy is

not denial of the democratic idea. Judged by the most pragmatic tests, democracy has weathered the cataclysm of the World War and extended its rule. It is the worse for wear, but at least it wears. We need not fly from one romantic absolute to another. If we focus attention on the human origin of all government, we shall have a more scientific temper for dealing with its frailties. We shall equally avoid blind attachment and romantic impatience only if we recognize the essentially provisional nature of all political arrangements. Such an attitude will treat government not only as a mechanism for day-to-day adjustments but also as an hypothesis in action, to be modified by the experience which it adduces.

Democracy has now been submitted to tests of time and stress that call for a reconsideration of its processes and assumptions. Such an examination must build up on the knowledge gained since modern forms of democracy were evolved, and more especially upon the insight into the dark recesses of man's nature, which pioneers like Freud and Jung are slowly making possible.

Acceptance of the democratic idea by no

means implies the exhaustion of the forms in which the idea has been clothed. Indeed, we may be sure that the implements and inventions of government have not sufficiently responded to the overwhelming transformation of the external arrangements of society. On these central issues of democracy, the essential wisdom for me has very recently been expressed in a dialogue in the Elysian fields between Plato and one of his friends, the report of which we owe to Mr. G. Lowes Dickinson:

> PH[ILALETHES]: . . . The question is no longer shall government intervene. It has intervened. The question is how far, in what way, over what field? And the answers must be worked out in the thick of the conflict. Only one thing is vital, in my judgment, that the conflict be of thoughts, not arms. For where arms intervene none can say whether anything will be left, when they have finished, for agreement and reason to reconstruct.
>
> PL[ATO]: And this government, which you think will more and more intervene, you also think must be democratic? . . .
>
> PH.: . . . The only alternative to democracy is government by the rich, and we know too well

what that has always led to. But also, and apart from that, there is, I think, a deeper reason for the view that only democracy is capable of solving this problem.

PL.: What reason is that?

PH.: Nothing but the willing and intelligent help of those who work can ever lead to good work. If they are coerced, they may submit, but they will not respond. And if we are to maintain and to increase production we must associate with enterprise the intelligence and the will of all who take part in it.

PL.: Yet democracy, you said, is everywhere being set aside, or where it survives, survives only precariously.

PH.: Yes. But in none of the new tyrannies have any of the problems we are discussing been solved, nor do I believe they ever can be by such means. Either these governments will convert themselves into democracies, or they will perish by revolution, or by slow decay.

PL.: You venture, after all, to prophesy.

PH.: Of the fact but not of the forms of democracy. There is nothing I can conceive to be final in the democratic institutions that exist. They may be modified indefinitely. But either they will be modified in such a way as to make democracy more effective or our societies will perish in

> tyranny or anarchy. Communities like ours cannot be controlled by a few supermen sitting as slave drivers above a herd of workers, even if the supermen existed, which in fact they do not.[42]

If the continuance of our civilization is to be predicated upon democracy, obviously knowledge and the capacity for judgment must permeate the whole community. But about education and how to attain it, we are also far less naïve and hopeful than we used to be. The aims and methods of education are today as much under fire as are those of government. For its underpinnings too have been shaken by new knowledge, and we are far more humble in assuming that wisdom and a conception of the public weal attend learning. Though we are doubtful as to the true nature of education and uncertain how to pursue it, there is no paradox in assuming that effective democracy presupposes a continuous process of adult education. "We must educate our masters," said a British statesman after the Second Reform Bill gave workingmen the vote. Time has only reinforced the deep wisdom of Robert Lowe's dictum. But he overlooked the complementary truth that the

people must educate their rulers. At least they must see to it that rulers are educated for the tasks of government.

I am the last person to undervalue the extent to which devotion, intelligence, and technical equipment are enlisted in government. Not political philosophy, not far-sighted planning, but the same pressure of circumstances which has made government penetrate into such a wide range of affairs has compelled resort to skill and training in its work. The all too common depreciation of men in public service is at once shallow and cruel. It mocks where it should praise; it debilitates where it should encourage. Publicity headlines the occasional egregious blunder, but the day-by-day achievement is unchronicled. The clash of politics, the friction between executive and legislature, the scrutiny of the press, and taste for scandal tend to make us know when things go wrong in government. It is right that it should be so. The critics of government cannot be too Argus-eyed. But no such conjunction of forces educates the public to a knowledge of the good in government. Virtue is proverbially not news, and appreciation of achievement in government, except when

attained on the colossal scale of a Panama Canal or in the dramatized conflict of foreign relations, is dependent on dull, technical details. The public is therefore surprisingly ignorant of the extent to which its servants contribute to the public good.

A very acute student of affairs has thus analyzed the quiet work of public administration:

> Most tax payers, including many who ought to be better informed, have a wholly inadequate idea of what they are getting for their money. The tendency is to regard taxes as a debit without any offsetting credit. They know what they pay out but they fail to realize what they receive in return. The direct contact, so far as the Federal government is concerned, is apt to be with the tax collector or the prohibition agent, men performing tasks which are extraordinarily difficult but which, it may be, are not popular in all quarters. Now my observation of the public service . . . is that with all the defects of that service, and there are many of them and some scandals just as there are in private business, the true story of its accomplishments would disclose an astonishing and magnificent net balance on the credit side. Passing over such commonplace matters as public education extending from the kindergarten to the State University, police and fire protection,

public health and sanitation, and the construction, maintenance and lighting of streets, highways and parks, an amazingly good record of public benefit can be shown, I believe, in those branches of the public service whose work is not so close to the public eye.

If an advertising agency of the calibre of that which serves the Bell telephone system were given the job of exploiting the accomplishments of the scientists and engineers of the Federal government in the fields of agricultural research, irrigation, forestry, standards, the geological survey and the like, I believe that agency would be bewildered by the multitude and magnitude of its opportunity.[43]

These are the observations of Mr. Joseph B. Eastman, who has watched government closely all his life and now is himself one of the ornaments of the public service. He furnishes striking proof of the extraordinary gifts which government does attract. That Mr. Eastman's reappointment as member of the Interstate Commerce Commission should have been strongly urged by railroads whose views on vital issues he has rejected, also proves that, so far as the public opinion which asserts itself is sufficiently informed regarding the quality of

public work, disinterested capacity in government will find support.

That talent should find its way as much as it does into public administration is the more striking since it enjoys so little public esteem. The rewards neither of money nor of prestige go with it. It is right that government should not even pretend to compete with the enormous salaries by which private enterprise tempts. The satisfactions of government service lie on a different level. But it is wholly wrong to expect civilized standards of public service from officials whose salaries are too low to enable them to meet the minimum standards of cultivated life. The public cannot expect the professional training, the detached judgment, and moral courage necessary for the conduct of such intricate public affairs, as, for instance, the administration of public service laws, from officials who are under financial pressure to meet the cost of decent education for their children. It is grotesque to put the solution of public utility problems in the hands of commissioners who are paid $1,600 a year. The average for all commissioners in the country is about $5,000—an average which includes exceptionally high salaries

in two states. Public officials should set an example of simplicity, but they ought not to be subjected to penury. Economy in public service means a wise expenditure of money. It does not mean salaries so low that only the unfit and the transient are attracted.

But that the public service, except in the highest offices, should lack prestige is even more disastrous than that its material rewards should be unduly meager. The whole tide of opinion is against public administration as a career for talent. The enormous rewards which industry offers to able young lawyers, engineers, economists, serve as a powerful attraction to ambitious youth. As against that, there are some, and more than we suspect, who find real satisfaction in work whose aim is the public good. But they have to contend against the whole mental and moral climate of our times—the impalpable but terrific pressure of current standards of achievement. These are overwhelmingly on the side of private gain. Let me avouch the testimony of one who has had a large hand in private as well as in public affairs, and whose power of prophetic thought is equaled only by his capacity for making money. I refer to John Maynard

Keynes. After a most destructive critique of the ideas underlying Russian Communism, Keynes finds one respectable challenge which it offers to contemporary western civilization. Its pertinence to the problems we are considering is, I believe, fundamental:

> At any rate [writes Keynes] to me it seems clearer every day that the moral problem of our age is concerned with the Love of Money, with the habitual appeal to the Money Motive in nine-tenths of the activities of life, with the universal striving after individual economic security as the prime object of endeavor, with the social approbation of Money as the measure of constructive success, and with the social appeal to the hoarding instinct as the foundation of the necessary provision for the family and for the future. The decaying religions around us, which have less and less interest for most people unless it be an agreeable form of magical ceremonial or of social observance, have lost their moral significance just because—unlike some of their earlier versions—they do not touch in the least degree on these essential matters. A revolution in our ways of thinking and feeling about money may become the growing purpose of contemporary embodiments of the ideal. Perhaps, therefore, Russian Communism

does represent the first confused stirrings of a great religion.[44]

In Great Britain the traditions of public service are as yet powerful enough to enlist the best brains of the country. In its Civil Service is found probably the largest concentration of distinguished talent. Nor is it conceivable that Great Britain would have come through its storms and stresses since the Crimean War without the very high quality of its public administration. The accession of the Labor Party to power in 1924 marked a political revolution in British history. Yet the break with the past involved in a government committed to the principles of socialism was accomplished with a shift in personnel of less than one hundred persons. In large matters of foreign policy one can hardly conceive of more contrasting types than Lord Curzon and Mr. Ramsay MacDonald. Yet when Mr. MacDonald succeeded Lord Curzon at the Foreign Office, the official who had served Lord Curzon continued as Mr. MacDonald's private secretary. Perhaps nothing could more pithily reveal how ingrained is the Civil Service in the stuff of English life. Yet the transition from the days when public office was bartered as though

it were the private property of politicians to the present system of professional public administration is a surprisingly recent development. It was introduced within the memory of men still living.

"The creation of this Service," according to Graham Wallas, "was the one great political invention in nineteenth-century England, and like other inventions it was worked out under the pressure of an urgent practical problem."[45] Experience in India had made it abundantly clear that the government of a great empire required special training, and disinterested selection. Therefore, as early as 1833, the government bill introduced by Macaulay for the renewal of the charter of the East India Company provided that "East India cadetships should be thrown open to competition."[46] This radical change as to Indian administration did not become effective until 1855.

In the meantime, however, Sir Charles Trevelyan, a former Indian Civil Servant and Macaulay's brother-in-law, began to occupy his mind with problems of civil-service reform at home. The jolts to the existing order in 1848

revealed the deep fissures in government, and furnished Trevelyan the opportunity to make his knowledge and forethought effective. "The revolutionary period of 1848," Trevelyan explained many years later, "gave us a shake, and created a disposition to put our house in order, and one of the consequences was a remarkable series of investigations into Public Offices which lasted for five years and culminated in the Organization Report."[47] Of that report, issued in 1854, Sir Charles Trevelyan himself, in collaboration with Sir Stafford Northcote, was the author.

> It was based throughout upon the positive idea of Government, upon the idea that Government must be carried on by men who think as to what ought to be done, instead of merely doing that which must be done. The idea frightened some of the ablest of the existing heads of departments.[48]

Even the famous Under-Secretary for the Colonies, Sir James Stephen, father of James Fitzjames and Leslie Stephen and grandfather of Virginia Woolf, found the innovation too drastic. "The world we live in is not, I think, half

moralized enough for the acceptance of such a scheme of stern morality as this."[49]

Sir James underestimated, as the worldly wise often do, the tough fiber of the world he lived in. Or perhaps it is more accurate to say that the painful experience of the Crimean War helped immensely to educate British opinion to an acceptance of Trevelyan's proposal. The conduct of that war exposed the terrible mischief of an administrative system based on patronage. So hard-headed a politician as Lord Palmerston, by an order in council, carried into effect the recommendations of the Trevelyan-Northcote report.

In consequence, in 1885, the first Civil Service Commissioners were appointed, with the duty of carrying on an independent examination of the nominees of Members of Parliament. They had their difficulties: the idea was new that the nominees of Members of Parliament should be subject to criticism by a Commission, and on one occasion Lord Palmerston sent to Somerset House, where the Civil Service Commissioners used to sit, ordering them to come to him and bring the answers of a certain candidate and the papers which they had set, in order that they might be carpeted by the Prime Minister.

The Civil Service Commissioners, writes Graham Wallas with pride,

> replied that unfortunately their regulations prevented them from doing anything of the kind, the papers could not go out of their possession, but if the Prime Minister would come to their office they would be only too happy to show them. Lord Palmerston saw the writing and arithmetic of his nominee and ceased to interfere.[50]

By 1870 the system had so thoroughly proved itself that Gladstone established open competition throughout the English Civil Service, by an order in council, "which was practically uncriticized and unopposed."

Students of public opinion will find it illuminating to explore the influences which made possible such a profound change in political institutions. Here, as elsewhere, working-class enfranchisement introduced powerful solvents into politics and government. But Mr. Wallas finds a deeper cause of change than the mere transference of voting power:

> The fifteen years from the Crimean War to 1870 were in England a period of wide mental activity, during which the conclusions of a few penetrating

thinkers like Darwin or Newman were discussed and popularised by a crowd of magazine writers and preachers and poets. The conception was gaining ground that it was upon serious and continued thought and not upon opinion that the power to carry out our purposes, whether in politics or elsewhere, must ultimately depend.[51]

"Serious and continued thought" requires systematic training. And the foundation of the British Civil Service is laid upon the British universities—until latterly the two ancient universities. The system is based upon the conviction of John Stuart Mill that "mediocrity ought not to be engaged in managing the affairs of State."[52]

I do not mean to claim perfection for the British Civil Service nor even the attainment of its own ideals. It has been under scrutiny of Royal Commissions from time to time, and, British-like, piecemeal improvements have been made. In the current stock taking of English institutions the Civil Service has not escaped. It is urged that the system has become too wooden, is not attuned to modern needs, and in some instances, particularly in the Colonial Office, defeats national policies by administrative action.

New educational developments, profound social changes, the new share of women in politics, call for a reconsideration of the assumptions and performances of the British Civil Service. With some of these vexing problems of statecraft and education a Royal Commission is now engaged. But the basis of political thinking by all the parties is the pervasive responsibility of a highly trained and disinterested permanent service, charged with the task of administering the broad policies formulated by Parliament and of putting at the disposal of government that ascertainable body of knowledge on which the choice of policies must be based.

The European revolutionary movements of 1848 touched the United States only by bringing to our shores liberty-loving rebels from the Continent. While, in England, 1848 led to a searching inquiry into the defects of her government, it renewed America's assurance of the virtues of our system. Moreover, America had no Crimean War, and perhaps no Charles Trevelyan. Besides, we were young and had an abundance of resources. Standards come late, and where there is plenty the temptations to waste are usually not resisted. The key to our

history of public administration, as to much else in history, is found in Emerson's quiet observation, "Mankind is as lazy as it dares to be."

In any event, while England was taking the first steps of a change from patronage to public service, the United States was justifying patronage by a political philosophy and establishing it as a public policy. The naked defense of the spoils system was expressed in the classic remarks of Senator Marcy in the debate on Jackson's nomination of Martin Van Buren to be Minister to England:

> It may be, sir, that the politicians of the United States are not so fastidious as some gentlemen are as to disclosing the principles on which they act. They boldly preach what they practice. When they are contending for victory they avow their intention of enjoying the fruits of it. If they are defeated, they expect to retire from office. If they are successful, they claim, as a matter of right, the advantages of success. They see nothing wrong in the rule that to the victor belong the spoils of the enemy.[53]

A hundred years have elapsed since Marcy's engaging candor. But his sentiments are still acted upon and occasionally survive even in

avowal. Woodrow Wilson is the only political scientist who ever occupied the Presidency. Yet it was his Secretary of State who thought that technical posts requiring high skill and training should be filled by "deserving Democrats." No President has had better reason to know than Mr. Hoover the irrelevance of purely party politics in the discharge of professional duties. And yet even in the appointment of judges to the lower federal courts, he has apparently, in some instances, for political reasons departed from the professional standards set by his Attorney General.

Behind the spoils system and all its survivals, there is a crude logic of democracy and the versatile energy of the pioneer. Both combined to indoctrinate Americans with a distorted belief in the simplicity of government. Someone has called the British Civil Service the skill department of government. But if public administration can be improvised, if it requires no particular skill, there is no need of special training, no need of the permanence of professionalism, no need of a skill department. That is precisely what Andrew Jackson thought. He practiced rotation in office because he thought permanence

makes for "corruption in some and in others a perversion of correct feelings and principles."

> The duties of all public officers [Jackson wrote in his first message to Congress] are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance; and I cannot but believe that more is lost by the long continuance of men in office than is generally to be gained by their experience. I submit, therefore, to your consideration whether the efficiency of the Government would not be promoted and official industry and integrity better secured by a general extension of the law which limits appointments to four years.[54]

There is this much to be said for Jackson's rustic view. Government then was operating within a relatively limited scope. In large measure, it was forbidding conduct; it was not itself an extensive participant in devising complicated arrangements of society and composing the conflict of its manifold interests. But Harding, nearly a hundred years after Jackson, had not even Jackson's excuse. The growing complexity of social organization had compelled a steady extension of legal control over economic and social interests. At first this intervention was

largely through specific legislative directions, depending for enforcement generally upon the cumbersome and ineffective machinery of the criminal law. By the pressure of experience, legislative regulation of economic and social activities turned to administrative instruments. The extent and range of governmental participation in affairs, the complexity of its administrative devices and the intricacy of the technical problems with which they were dealing had never been greater than when Harding came to the Presidency. There never was a more pathetic misapprehension of responsibility than Harding's touching statement that "Government after all is a very simple thing."

I recall the sentence and it deserves to be remembered, because Harding expressed the traditional American conception of government still deeply inured in American opinion. It is an assertion of faith in simplicity that serves as an escape from the painful problems due to the complexity of government. Until these notions of deluding simplicity are completely rooted out, we shall never truly face our problems of government.

The theoretical defense of the spoils system

could hardly withstand its practical results. It was with the moral aspects of political jobbery that the promoters of early civil-service reform, Carl Schurz, George W. Curtis, and E. L. Godkin, were mostly concerned. Corruption, not only of individuals but of the whole democratic process, was involved. "The allurements of an immense number of offices and places exhibited to the voters of the land," wrote Cleveland, "and the promise of their bestowal in recognition of partisan activity, debauched the suffrage and robbed political action of its thoughtful and deliberative character."[55]

But the problem, as we now see, is much more complicated. No doubt democracy is peculiarly dependent on clean and disinterested government. By the very fact of numbers, a corrupt and jaundiced democracy can be most blind and oppressive. But in the modern world the simple virtues of honesty and public devotion are not enough. Alone they will not unravel the tangled skein of social-economic complexities. They cannot even analyze the issues to which answers must be found. Indeed, honesty and public zeal without training and a sophisticated judgment may very readily become the un-

witting tool of half-truths and misrepresentation. Compelled to grapple with a world more and more dominated by technological forces, government must have at its disposal the resources of training and capacity equipped to understand and deal with the complicated issues to which these technological forces give rise.

There is a good deal of loose talk about science in politics. If by "science in politics" is meant the availability of an irrefragable fund of knowledge in the possession of a few wise people who could, out of hand, solve the conundrums of government, it is merely another romantic delusion. But if by science we mean an intellectual procedure and a temper of mind, there must be science in government, because science dominates society. It then becomes a question of how much science government employs and how good it is.

The great political issues of the nineteenth century thrived in the main, on the levels of feeling and rhetoric. The extension of the franchise, popular elections, the abolition of slavery (apart from its economic aspect) are not matters that yielded to statistics or economic learn-

ing. But feeling and rhetoric are blind guides for the understanding of contemporary political issues. They only distract and confuse; indeed they create an atmosphere in which wise solution is largely thwarted. For the staples of contemporary politics—the organization of industry, the control of public utilities, the well-being of agriculture, the mastery of crime and disease —are deeply enmeshed in intricate and technical facts, and must be extricated from presupposition and partisanship. Such matters require systematic effort to contract the area of conflict and passion and widen the area of accredited knowledge as the basis of action.

The history of reparations since the Versailles Treaty illustrates the intricate basis of political controversies which affect the economic balance of a good part of the world, and the social standards of millions of people. It would not be true to say that reparations presented questions merely for economists. But certainly the political judgments which were involved could only be taken blindly and in passion without an appreciation of those intricate economic factors which Maynard Keynes was the first to elucidate courageously at the bar of public opinion.

Similarly, any solid judgment upon public utility controversies presupposes the capacity to see the meaning of complicated technical data. In both these fields of politics, agitation and advocacy have their place. They are instruments of education, means for making effective the findings of knowledge and the lessons of experience. But the quiet, detached, laborious task of disentangling facts from fiction, of extracting reliable information from interested parties, of agreeing on what is proof and what surmise, must precede, if agitation is to feed on knowledge and reality, and be equipped to reach the mind rather than to exploit feeling.

"It is difficult to realize," I quote from Graham Wallas, "how short a time it is since questions for which we now rely entirely on official statistics were discussed by the ordinary political methods of agitation and advocacy."[56] But in the United States many of these questions are still anybody's guess—are still the football of political debate. In 1830, the House of Commons wrangled as to the existence and extent of economic distress. In England these facts—the condition of trade and the state of unemployment—are now as dependably revealed as the

barometer registers atmospheric pressure. Debate continues to be anxious and even bitter about modes for relieving unemployment. But at all events search for remedies is not confused and diverted by doubt that anything needs to be remedied. We are still where England was in 1830. Congress still debates whether unemployment really exists, and if so, where and how much. And we have the extraordinary spectacle of the Secretary of Labor of the United States issuing unemployment estimates which the Commissioner of Labor of the state of New York denies.

Let me take another illustration of the limited application of scientific standards in public administration. Just as in eighteenth-century England it was matter for political controversy whether the population was rising or falling, so in twentieth-century America, the homicide or burglary rate in our great cities is a recurring subject for political debate. And this is a very fair index of our whole attitude toward problems of crime. That the level of professionalism, of trained capacity, in our administration of criminal justice is very low, compared with that prevailing in Great Britain and on the Conti-

nent, is one of the patent facts about our system. In saying this I hope I can avoid the appearance of being too simple about crime. I share the conviction of those long immersed in these problems that crime is a true measure of the standards of a civilization. One cannot worry much about these questions without realizing that they touch the motives and purposes and directions of contemporary society. But that our lack of professionalism affects the whole situation hardly admits of doubt. Crime is age old and ubiquitous, but by common consent it assails in greatest measure the most prosperous country in the world.

No one will deny that problems of crime are at least as difficult as problems of public health and hydraulic engineering. But public health and hydraulic engineering are now as a matter of course made the concern of specialists who give to their problems the devotion of a lifetime. That is the essence of professionalism—men adapted by nature for inquiries for which they are elaborately trained and which they pursue as a permanent career. In regard to crime, this condition on the whole does not obtain. Knowledge of the causes of crime, the

ways for its prevention and detection, the modes of its treatment, are widely deemed the common possession of the man in the street. Even where professional training is exacted, namely, from lawyers and judges who at present play such an undue rôle in the administration of criminal justice, merely a general and not a specialized training is required. But even these professionally educated functionaries play their parts for only short terms or discontinuously. In the United States there is no body of highly trained, capable men who are drawn to the enigmas of crime as problems to be solved, who are adequately disciplined for their exploration and who give the preoccupation of a lifetime to their solution. Broadly speaking, the directing officials are not technically trained for their work before they attain office, and the want of permanent careers through office deprives the community of capitalizing office itself as a school of training. There is thus no professionalism in administration. Partly cause and partly effect, there is equally no professionalism (always broadly speaking) of research in crime, as there is research in medicine and research in the natural sciences. The two indispensable interact-

ing forces in the promotion of knowledge and the control of natural phenomena, to wit, professionalism in inquiry and professionalism in control are thus lacking as to crime.

There can hardly be room for difference of opinion that indispensable to any effective or candid dealing with crime is the continuous, disinterested, scientific study of its problems. Just as disease has been withdrawn from the realm of quackery and magic, so crime must be subjected to that systematic, disciplined, continuous attack of reason which we call scientific procedure. Neither crime commissions nor presidential pronouncements will make a lasting dent upon crime unless we can secure acceptance of the standards of professionalism as a postulate of our government, similar to the acceptance by the British of the ideas which underlie their Civil Service.

I am far from suggesting that the conquest of science calls for a new type of oligarchy, namely, government by experts. I mean no such thing. To call the administrative *régime* of the British Civil Service "the new despotism" as does Lord Hewart, is to use the language of lurid journalism. But the power which must more and

more be lodged in administrative experts, like all power, is prone to abuse unless its exercise is properly circumscribed and zealously scrutinized. For we have greatly widened the field of administrative discretion and thus opened the doors to arbitrariness. The dangers and difficulties have been acutely analyzed by General Smuts:

> Beneficent if kept under proper control, it [the power of the Civil Service] becomes an unmitigated bureaucracy if it assumes control itself, as it tends to do under weak and rapidly changing governments. In some European countries, and notably in Russia, the bureaucracy has been the real cause of revolution. The uncontrolled service ceases to be the loyal servant, and becomes parasitical on the country; even governments become its puppets, and in the end it comes to exercise authority for its own ends, and not for the public good. An ideal public service would go far to supply the deficiencies of democratic government, with its vacillation and inexpertness. But in the complicated organism of the state, any organ which becomes independent of the rest becomes a danger, and nothing is so dangerous to the state as a public service which does not march with the people, and becomes a drag on well-ordered progress; it may even have to be dynamited out of

its fixed position. Against the growing tendency toward bureaucracy in the public service, only strong governments can protect the people, and democracy does not, under present conditions, tend to produce strong governments. And so the vicious circle continues. Human government can be no better in the end than human nature, and popular self-government will continue to be a difficult machine to work in practice until the political education of the people has reached a very much higher level.[57]

Undoubtedly ultimate protection is to be found in ourselves, our zeal for liberty, our respect for one another and for the common good —a truth so obviously accepted that its demands in practice are usually overlooked. But safeguards must also be institutionalized through machinery and processes. These safeguards largely depend on very high standards of professional service, an effective procedure (remembering that "in the development of our liberty insistence upon procedural regularity has been a large factor"), easy access to public scrutiny and a constant play of alert public criticism, especially by an informed and spirited bar. Moreover, while expert administrators may sift out issues, elucidate them, bring the light

of fact and experience to bear upon them, the final determinations of large policy must be made by the direct representatives of the public and not by the experts. Whether, for instance, the government should itself operate Muscle Shoals or lease its water power, raises questions beyond the authority of engineer or economist. In the final analysis, we are in the realm of judgment regarding values as to which there is as yet no voice of science. The very notion of democracy implies the right of the public to decide these matters on its own choice.

Government is itself an art, one of the subtlest of the arts. It is neither business, nor technology, nor applied science. It is the art of making men live together in peace and with reasonable happiness. Among the instruments for governing are organization, technological skill, and scientific methods. But they are all instruments, not ends. And that is why the art of governing has been achieved best by men to whom governing is itself a profession. One of the shallowest disdains is the sneer against the professional politician. The invidious implication of the phrase is, of course, against those who pursue self-interest through politics. But

too prevalently the baby is thrown out with the bath. We forget that the most successful statesmen have been professionals. Walpole, Pitt, Gladstone, Disraeli, and Asquith were professional politicians. Beveridge's *Life of Abraham Lincoln* serves as a reminder that Lincoln was a professional politician. Politics was Roosevelt's profession, Wilson was, all his life, at least preoccupied with politics, and Calvin Coolidge, though nominally a lawyer, has had no profession except politics. Canada emphasizes the professionalism of politics by making the Leader of the Opposition a paid officer of state.

In a democracy, politics is a process of popular education—the task of adjusting the conflicting interests of diverse groups in the community, and bending the hostility and suspicion and ignorance engendered by group interests toward a comprehension of mutual understanding. For these ends, *expertise* is indispensable. But politicians must enlist popular support for the technical means by which alone social policies can be realized. Æ summed it all up when he said "The expert should be on tap, but not on top." In this country we have been so anxious to avoid the dangers of having the expert on

top that we suffer from a strong reluctance to have him on tap.

We must also develop much more than we have done so another device for attaining knowledge for the guidance of public judgment. The permanent process of public administration must be reinforced from time to time by special commissions of inquiry. Sir Arthur Salter, Professor Alfred Zimmern, and General Smuts have written illuminatingly upon the adjustments of prickly international conflicts through committees of experts. And the history of British democracy might in considerable measure be written in terms of the history of successive Royal Commissions. We too have had notable commissions of inquiry, but by and large, the experience and tradition of the British Royal Commissions are lacking in the United States. We have no standards to guide the technique of inquiry, the mode of procedure, the relations to public and executive. Yet such commissions of investigation ought more and more to be called into use to deflate feeling, define issues, sift evidence, formulate alternative remedies. If guided with imagination and courage, such commissions are admirable means for taking the

nation to school. They should aim to ascertain facts, pose problems, and seek to enlighten the public mind. To be effective, such inquiries into political problems must be pursued in a scientific temper. Therefore ample time for thorough study is essential. There must be a total lack of the urgencies of the immediate, indifference to the compromises that may become pertinent after the problems are duly analyzed and alternative proposals for action suggested. Like all scientific work, this must be pursued with complete indifference to politics. It must be dedicated to the search for fact, and be as free from dependence on the actual or supposed wishes or needs even of the President as is the Supreme Court of the United States.

The difficulties of our social-economic problems will not abate with time. One may be confident that they will become more complicated. They will make increasing demands upon trained intelligence. If government is to be equal to its responsibilities, it must draw more and more on men of skill and wisdom for public administration. As Oxford and Cambridge of old, our institutions of higher learning must be training schools for public service, not through

utilitarian courses but by the whole sweep of their culture and discipline. Above all, the universities must be reservoirs of disinterestedness. For the more contentious issues of politics lie not in the domain of the natural sciences. They depend on the wisdom of the social sciences. But in our generation at least, the social sciences still rest ultimately not upon verifiable and controlled experiments but, in large measure, upon tentative conclusions and judgment. It is therefore absolutely vital that judgment be as disinterested as possible, that it be not exposed to the undertow of unconscious influences other than those which inhere in our present limited understanding of the workings of the mind. Thinking and reflection in the universities ought not to be guided along the smooth path of material interest or any of its derivatives, in all their subtle forms.

I have arrived where Huxley arrived more than fifty years ago, in celebrating the opening of Johns Hopkins. With prophetic insight, he foreshadowed our difficulties and indicated our only hope.

I constantly hear Americans speak of the charm

which our old mother country has for them, of the delight with which they wander through the streets of ancient towns, or climb the battlements of mediaeval strongholds, the names of which are indissolubly associated with the great epochs of that noble literature which is our common inheritance; or with the blood-stained steps of that secular progress, by which the descendants of the savage Britons and of the wild pirates of the North Sea have become converted into warriors of order and champions of peaceful freedom, exhausting what still remains of the old Berserk spirit in subduing nature, and turning the wilderness into a garden. But anticipation has no less charm than retrospect, and to an Englishman landing upon your shores for the first time, travelling for hundreds of miles through strings of great and well-ordered cities, seeing your enormous actual, and almost infinite potential, wealth in all commodities, and in the energy and ability which turn wealth to account, there is something sublime in the vista of the future. Do not suppose that I am pandering to what is commonly understood by national pride. I cannot say that I am in the slightest degree impressed by your bigness, or your material resources, as such. Size is not grandeur, and territory does not make a nation. The great issue, about which hangs a true sublimity, and the terror of overhanging fate, is what are you going to do with all these things?

What is to be the end to which these are to be the means? You are making a novel experiment in politics on the greatest scale which the world has yet seen. Forty millions at your first centenary, it is reasonably to be expected that, at the second, these states will be occupied by two hundred millions of English-speaking people, spread over an area as large as that of Europe, and with climates and interests as diverse as those of Spain and Scandinavia, England and Russia. You and your descendants have to ascertain whether this great mass will hold together under the forms of a republic, and the despotic reality of universal suffrage; whether state rights will hold out against centralisation, without separation; whether centralisation will get the better, without actual or disguised monarchy; whether shifting corruption is better than a permanent bureaucracy; and as population thickens in your great cities, and the pressure of want is felt, the gaunt spectre of pauperism will stalk among you, and communism and socialism will claim to be heard. Truly America has a great future before her; great in toil, in care, and in responsibility; great in true glory if she be guided in wisdom and righteousness; great in shame if she fail. I cannot understand why other nations should envy you, or be blind to the fact that it is for the highest interests of mankind that you should succeed; but the one condition of success, your sole safeguard, is the

moral worth and intellectual clearness of the individual citizen. Education cannot give these, but it may cherish them and bring them to the front in whatever station of society they are to be found; and the universities ought to be, and may be, the fortresses of the higher life of the nation.[58]

Notes

1. Quoted in Zimmern, *The Greek Commonwealth* (1915), p. 202.
2. *Collected Legal Papers* (1920), pp. 292–293.
3. New York *Times,* March 25, 1930, p. 22.
4. H. J. Res. 185, 71st Cong., 2d Sess. (1930).
5. Root, *Addresses on Government and Citizenship* (1916), pp. 448–449.
6. Quoted in Morley, *Burke* (1907), p. 107.
7. As quoted from the *Illinois State Journal* in Beveridge, *Abraham Lincoln* (1928), II, 576.
8. 157 U.S. 429 (1895); 158 U.S. 601 (1895).
9. *Collected Legal Papers* (1920), p. 295.
10. Churchill, *Lord Randolph Churchill* (1907), Appendix 7, p. 870.
11. 198 U.S. 45 (1905).

12a. Dissenting in *Truax* v. *Corrigan,* 257 U.S. 312, 342, 344 (1921).

12b. Report of the Royal Commission on the Constitution (Australia, 1929).

13. Ford, *Writings of Thomas Jefferson,* X, 42–43.
14. *Ibid.,* p. 43.
15. From President Hoover's Inaugural as reported in the New York *Times,* March 5, 1929, p. 6, col. 1.
16. Inquiry in Regard to the Interrogation by the Police of Miss Savidge, Cmd. 3147 (1928); Report of the Royal Commission on Police Powers and Procedure, Cmd. 3297 (1929).
17. Minnesota Rate Cases, 230 U.S. 352, 402 (1913).
18. Ford, *Writings of Thomas Jefferson,* IX, 76.
19. See Frankfurter and Landis, "The Compact Clause of the Constitution—A Study in Interstate Adjustments," 34 *Yale L.J.* 685 (1925).
20. *Legal Essays* (1927), p. 159.

21. *McCulloch* v. *Maryland,* 4 Wheat. (U.S.), 316, 407 (1819).
22. *Hurtado* v. *California,* 110 U.S. 516, 530–531 (1884).
23. *Missouri, Kansas & Texas Ry. Co.* v. *May,* 194 U.S. 267, 270 (1904).
24. *Missouri* v. *Holland,* 252 U.S. 416, 433 (1920).
25. Mr. Justice Brandeis dissenting in *Myers* v. *United States,* 272 U.S. 52, 240, 293 (1926).
26. Hughes, *Addresses* (1908), p. 139.
27. *Second Annual Report,* Massachusetts Board of Railroad Commissioners (1871), p. 38.
28. *Addresses* (1908), pp. 89–90.
29. *N. Y. State Bar Assn. Rep.,* XXXIX, 269–270.
30. *N. Y. State Constitutional Convention* (Revised Record) (1915), III, 3101–3102.
31. N. Y. State Commission on Revision of the Public Service Commissions Law, *Report of Commissioners* (1930), p. 1.
32. I am indebted to the kindness of Col. Charles G. Blakeslee, Counsel of the Public Service Commission of New York, for verifying these data from the official records.
33. Mr. Justice Brandeis dissenting in *S. W. Tel. Co.* v. *Pub. Serv. Comm.,* 262 U.S. 276, 289, 298–299 (1923).
34. *Ibid.,* p. 301.
35. *Re Michigan State Tel. Co.,* P. I. R. 1921 C, pp. 545, 554–555, as quoted in 262 U.S. p. 300, note 12 (1923).
36. N. Y. State Commission on Revision of the Public Service Commissions Law, *Report of Commissioners* (1930), p. 38. In this table the figures are reproduced exactly as they were printed in the *Report.*
37. Dissenting in *S. W. Tel. Co.* v. *Pub. Serv. Comm.,* 262 U.S. 276, 289, 308 (1923).
38. *Report of the Special Commission on Control and Conduct of Public Utilities* (House No. 1200, 1930), pp. 50, 81–82.

39. *Messages and Papers of the Presidents,* XVI, 7153–7155.
40. From testimony given by Mr. Owen D. Young before the Senate Committee on Interstate Commerce, as quoted by Joseph B. Eastman on behalf of the Interstate Commerce Commission in a letter dated January 20, 1930, to Chairman Couzens of the Senate Committee on Interstate Commerce.
41. Smuts, *Africa and Some World Problems* (1930), pp. 175–176.
42. "A Political Dialogue," *Political Quarterly,* I (1930), 248, 261–263.
43. *38th Annual Convention of the National Assn. R. R. and Utilities Commissioners* (1926), pp. 46–47.
44. *New Republic,* XLIV (1925), 302; Keynes, *Laissez-Faire and Communism* (1926) p. 134–135.
45. *Human Nature in Politics* (1915), p. 249.
46. *Ibid.,* p. 250.
47. Quoted in Wallas, "Government," *Public Administration,* VI (1928), 3, 8.
48. *Ibid.*
49. Quoted in Wallas, *Human Nature in Politics* (1915), p. 252.
50. Wallas, "Government," *Public Administration,* VI (1928), 8, 9.
51. *Human Nature in Politics* (1915), pp. 253–254.
52. Quoted in Wallas, "Government," *Public Administration,* VI (1928), 8.
53. *Congressional Debates,* VIII (1832), 1325.
54. *Richardson, Messages and Papers of the Presidents,* II, 449.
55. *Ibid.,* VIII, 363.
56. *Human Nature in Politics* (1915), p. 245.
57. *Africa and Some World Problems* (1930), pp. 174–175.
58. *American Addresses* (1877), pp. 124-126.

DATE DUE

JUL 2 1984

GAYLORD

PRINTED IN U.S.A.